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No. 99-

IN THE

Supreme Court of the United States

KATHLEEN KLINE, ANNE WEDOW, ERMA MORGAN and BETTY TAYLOR,

Petitioners,

v.

THE CITY OF KANSAS CITY, MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE "CONTINUING VIOLATION THEORY" IN DISCRIMINATION CASES PRECLUDES CONSIDERATION OF EVENTS OUTSIDE THE LIMITATIONS PERIOD FOR PURPOSES OF ESTABLISHING LIABILITY AND DAMAGES?

II. WHETHER A WOMAN MAY CLAIM AS PART OF HER "HOSTILE ENVIRONMENT" ACTS DIRECTED AT OTHER WOMEN, OR WOMEN IN GENERAL, OF WHICH SHE IS AWARE, BUT WHICH WERE NOT DIRECTED AT HER PERSONALLY, OR ALTERNATIVELY, MAY SHE USE SUCH EVIDENCE TO ESTABLISH INTENT AND MOTIVE ON THE PART OF THE EMPLOYER TO DISCRIMINATE?

III. WHETHER EVIDENCE THAT A PLAINTIFF IS TREATED MORE HARSHLY FOR **LESS** SERIOUS EVENTS IS SUFFICIENT TO ESTABLISH DISPARATE TREATMENT OR WHETHER IT IS NECESSARY THE PERSONS TO WHICH A PLAINTIFF COMPARES HERSELF FOR PURPOSES OF ESTABLISHING DISPARATE TREATMENT ARE TREATED LESS HARSHLY FOR THE **IDENTICAL** OFFENSE?

IV. WHETHER IF PLAINTIFF IS UNABLE TO PROFFER "SIMILARLY SITUATED PERSONS" IN THE NONPROTECTED CLASS WHO WERE TREATED MORE FAVORABLY, PLAINTIFF CAN PROVE DISPARATE TREATMENT BY REBUTTING THE PROFFERED BUSINESS REASON AND SHOWING OTHER EVIDENCE OF DISCRIMINATION TOWARDS THE PROTECTED CLASS?

V. WHETHER CHAPTER 213 OF THE MISSOURI STATUTES PERMITS THE SUBMISSION OF PUNITIVE DAMAGES AGAINST A STATE ENTITY?

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The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 175 F.3d 660 (8th Cir. 1999). A copy of the Opinion is included in the Appendix at Appendix A at 1a. The Order of the Eighth Circuit denying Petition for Rehearing and Suggestion for Rehearing en banc is included in the Appendix at Appendix I at 107a. The Judgment of the District Court for the Western District of Missouri is included in the Appendix at Appendix B at 20a. The Opinion of the District Court on posttrial motions, other than equitable relief, is included in Appendix D at 44a. The Opinion of the District Court on equitable relief is included in Appendix C at 22a. The Opinion of the District Court on Motions in Limine is included in Appendix E at 64a. The Opinion of the District Court on the Respondent's Motion for Summary Judgment directed at Kathleen Kline is included in Appendix H at 94a. The Opinion of the District Court on the Respondent's Motion for Summary Judgment directed at Anne Wedow is included in Appendix F at 75a. The Opinion of the District Court on the Respondent's Motion for Summary Judgment directed at Erma Morgan is included in Appendix G at 83a. The Order entered September 8, 1999 by the United States Supreme Court extending the time to file Petition for Writ of Certiorari to November 27, 1999.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Opinion on May 5, 1999. On May 19, 1999 Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which the United States Court of Appeals denied on June 30, 1999. App. I at 107a.[1] A Request for

1. Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

Extension of Time to File Petition for Writ of Certiorari was directed to Justice Thomas on September 2, 1999. An Order was entered by the United States Supreme Court on September 8, 1999 extending the time for the filing of the Petition for Writ of Certiorari to November 27, 1999.

STATEMENT OF THE CASE

The four Petitioners worked for the Kansas City, Missouri Fire Department (KCMOFD); Kline and Wedow worked in Fire Suppression — the fire fighting division of the KCMOFD, while Morgan and Taylor worked in Administration. At the time of trial, Kline, Wedow and Morgan were still working for the KCMOFD while Taylor had been fired. Petitioners were hired into the KCMOFD in the late 1970's and 1980's. Kline and Wedow were among the very first women hired in Fire Suppression in the KCMOFD.

The KCMOFD during the 1970's through the time of trial comprised about 800 employees in several different locations within the city limits — City Hall for top level administration, Communications in a second building, and the various station houses which were assigned to "battalions" throughout the City. Kline and Wedow worked in numerous different station houses throughout their time in the KCMOFD and also came to City Hall and the Communications Department for various work-related reasons. Morgan and Taylor worked exclusively at City Hall and occasionally had work related visits to the Communications Department. Fire Suppression personnel rotated among the Fire Stations, Communications and City Hall at various times in their careers.

In 1993 Kline, Wedow and Morgan filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC)[2], which was followed by a charge of discrimination in 1994 for Taylor. Each of the charges made allegations of sex discrimination, sexual harassment and retaliation under both Title VII and the Missouri Human Rights statute[3]. The charges alleged a "continuing violation" as well as a "pattern and practice" of discrimination for each of the women, in the areas of promotions, raises, awards, sexual harassment, racially hostile atmosphere for Morgan, and retaliation, including discipline and termination of Taylor. The retaliation claim included claims for filing Petitioners' charges as well as for opposing practices of the KCMOFD based upon sex, race and retaliation and supporting other women in their claims of discrimination against the KCMOFD.

In 1994 "right to sue" letters were obtained from both the Justice Department and the MCHR. Suit was filed in the United States District Court for the Western District of Missouri.[4] The Second Amended Complaint, upon which trial proceeded, included claims for sexual discrimination, sexual harassment and retaliation for each of the women and also for racial harassment for Morgan under both federal and state laws.

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2. A concurrent filing was made with the Missouri Commission on Human Rights (MCHR).

3. *See* statutory sections set forth in Appendix J, p. 108a.

4. A First and Second Amended Complaints were subsequently filed for procedural reasons. A fifth plaintiff, who worked in Communications, subsequently voluntarily dismissed her claims with prejudice and is not a Petitioner before this Court.

The claims alleged in the Second Amended Complaint were broader than those alleged in the charges of discrimination. For example, in the sex discrimination claims pled under federal and state law, Kline and Wedow alleged that women in Fire Suppression had ill-fitting clothing and equipment made for men, not women, and almost no facilities for sleeping, showering, or female hygiene whereas men had clothes tailored for men as well as adequate facilities for privacy in sleeping, showering and dressing. These issues were also part of their sexual harassment/hostile environment claims. These issues were not specifically raised in their charges, but the Eighth Circuit ultimately determined they were in fact "similarly related" to their other claims.[5] Additionally, all Plaintiffs claimed their "hostile environment" consisted not only of what happened to themselves, but what happened to other women in their presence as well as **what happened to other women of which they were aware or became aware** through discussions with other women, including the other Plaintiffs in the case. Plaintiffs also sought recovery for the **entire** time period they were in the KCMOFD as they claimed the disparate treatment, hostile environment based upon sex (or race) and retaliation permeated every aspect of their work environment from the commencement of their employ.

During discovery Petitioners itemized in great detail every instance of disparate treatment, harassment (sexual or racial), and retaliation which occurred to them from the commencement of their employment until June 1, 1997, the cutoff for discovery. They also obtained discovery from each

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5. The Eighth Circuit, however, found that it was "harmless error" for the District Court to exclude these claims. App. A, pp. 11a-15a.

of the other approximately 22 women in the KCMOFD in Fire Suppression and many of the women in Administration with regard to their issues of disparate treatment as well as sexual harassment or harassment based upon sex. Discovery was directed at issues of disparate treatment and hostile environment for **all** women in the KCMOFD, including issues of disparate treatment in promotions, awards, pay, opportunities to work out of class at a higher grade, physical and verbal harassment with either sexual overtones or done because they were women, shunning, ill-fitting clothing and equipment and lack of adequate changing-showering-sleeping facilities for the women. Discovery was also directed at the lack of training on sex discrimination issues resulting in inadequate procedures to report and investigate acts of discrimination as well as retaliation for those who complained or opposed the practices. An in-depth review was made of most of the KCMOFD's personnel files to assist in establishing disparate treatment in promotions, awards and discipline — the latter particularly with regard to establishing disparate treatment of Taylor.

Respondent filed Rule 56 Motions against each of the Petitioners. Among Respondent's issues were: that events more than 300 days[6] prior to the filing of the charge of discrimination could not be the subject of relief under Eighth Circuit and Missouri state law; that events not directed at Petitioners personally could not be considered as part of the **Petitioners'** "hostile work environments" whether based on race or sex even if they were aware of the events; that events not **specifically** alleged in their charges of discrimination (such as the clothing and facility issues) could not be actionable as they were not administratively exhausted; and

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6. And 180 days for the MCHR claims.

that because this type of evidence, that is, evidence of other women's issues, clothing, facilities, and items outside the 180/300 day time period, was not "actionable" Petitioners failed to allege sufficient facts to constitute a "hostile environment" based upon sex and/or race to go to the jury.

The District Court in three separate rulings[7] issued September 29, 1997 agreed with many of Respondent's positions for Kline, Wedow and Morgan. These rulings and subsequent rulings by both the District and Appellate Courts disregarded the doctrine of "continuing violation" as developed by the Circuits. As a result Petitioner Wedow and Morgan's "hostile environment" claims based upon race and sex were dismissed prior to trial for failure to state sufficient facts **within** the time period to constitute an actionable cause. The remaining claims that were permitted to go to the jury precluded the jury from considering any evidence outside the 180/300 day time period for purposes of awarding damages. Although some evidence between 1989 and the commencement of the statutory time period was permitted to be heard by the jury as "relevant background evidence", no evidence of any kind that predated 1989 was permitted to be heard or considered by the jury for any purpose. The rulings also excluded testimony of what happened to other women of which Petitioners were aware to establish the **Petitioners'** own hostile environments.

These Rule 56 rulings limiting Petitioners' claims were reinforced by rulings in Respondent's favor on Respondent's

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7. Kline at App. H, pp. 94a-106a; Wedow at App. F, pp. 25a-82a; Morgan at App. G, pp. 83a-93a. These were not issues that significantly affected Taylor and were not raised on appeal for her.

Motions in Limine[8] made October 17, 1997 which excluded other women's testimony regarding discriminatory events directed at them, clothing and facility issues not only on the merits of Petitioners' claims, but even to show "knowledge" of the KCMOFD of the discriminatory conduct through "pervasiveness", or to establish "intent to discriminate" or "punitive damages". App. E, pp. 65a-70a. Only two limited pieces of evidence were permitted regarding "other women" — one an incident in 1993 where KCMOFD males allegedly yelled obscenities at KCMOFD women cadets; and excerpts from the City's Human Resource studies in 1992 and 1994 given to the City Council showing high levels of complaints in the KCMOFD about discrimination, harassment, and retaliation. Finally, these same rulings were incorporated into jury instructions which **limited Petitioners' recovery to events that occurred within** the 180/300 day time period and which excluded events occurring to other women outside Petitioners' presence, or issues regarding clothing and facilities, or events that occurred outside the 180/300 day time period.

The jury returned verdicts in Kline's favor on her disparate treatment claim for failure to promote her, her sexual harassment claim and her retaliation claim and on Taylor's disparate treatment claim for termination. The jury returned verdicts in Respondent's favor on other of Kline's disparate treatment claims, on all of Wedow's disparate treatment and retaliation claims, on Morgan's retaliation claims and on Taylor's disparate treatment claims for

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8. At the commencement of trial Petitioners' counsel renewed the issues raised in the Motions in Limine and the District Court reaffirmed its prior ruling on the Respondent's Motions in Limine. The Eighth Circuit found Petitioners had sufficiently preserved their objections.

assignment of light duty and in disciplining her, as well as on her hostile environment and retaliation claims. The jury awarded Kline backpay and compensatory damages on her failure to promote claim in the amount of $47,134 and $150,000 in punitive damages; $1.00 nominal damages on her compensatory damage claim for sexual harassment and $100,000 in punitive damages; and $1.00 nominal damages on her retaliation claim and $50,000 in punitive damages. The jury awarded Taylor $48,098.00 in backpay and a like sum for compensatory damages, as well as $100,000 in punitive damages for her termination disparate treatment claim.

The District Court then held a multiple-day "equitable relief" hearing for both Kline and Taylor. At this hearing, the District Court, without a jury, heard evidence from most of the other women in the KCMOFD about their disparate treatment and "hostile environment" while employed in the KCMOFD.

Thereafter, the parties filed their posttrial Motions. Among the issues raised by Respondent were the availability of punitive damages under Missouri law. On February 17, 1998 the District Court entered two separate orders — one on the parties' posttrial motions, App. D, pp. 44a-63a, and one for equitable relief for Kline and Taylor, App. C, pp. 22a-43a. In the first of these Orders the District Court struck the punitive damages awarded Petitioners Kline and Taylor agreeing with Respondent that they were not permitted under Missouri law, although neither the Missouri Appellate or Supreme Courts had specifically ruled to this effect on this statute. App. D, pp. 53a-58a. The District Court affirmed the verdicts in favor of Kline and Taylor, App. D, p. 63a, and in favor of Respondent for Wedow and Morgan.

In a separate order, the District Court imposed further equitable relief for both prevailing Petitioners. App. C, pp. 22a-43a. This equitable relief included placing Kline in a Battalion Chief position retroactively, ordering changes in the manner in which the City handled discrimination claims and maintained records on complaints of discrimination, setting up a committee composed of KCMOFD personnel, including one of the Plaintiffs to agree on training issues, and ordering extensive training for all of the KCMOFD personnel as well as new cadets.

The parties both thereafter filed timely separate appeals from the posttrial order on the parties' Posttrial Motions. Neither party filed an appeal from the equitable relief order. The separate appeals were consolidated and one opinion was issued on both appeals May 5, 1999.

On the Respondent's appeal of Taylor's verdict, the Eighth Circuit found in Respondent's favor claiming the persons with which Taylor sought to compare herself were not "similarly situated" to her because Taylor was discharged for "performance" issues and the males to whom she had compared herself were disciplined for "conduct" issues. Taylor had argued to the Eighth Circuit that her verdict should stand for several reasons. First, the jury could have found the reasons given by the KCMOFD for her termination lacked credence and were therefore "pretext" as the District Court found in its Posttrial ruling. App. D, pp. 49a-53a. Second, Taylor argued that the discipline resulting in termination of her was substantially less severe than the discipline given men in Administration for far more serious "conduct" issues. Third, Taylor argued that there was no one "similarly situated to her". Finally, Taylor argued that the jury heard the evidence on Kline, Wedow and Morgan's

claims without any limiting instructions offered by Respondent or given by the District Court and that the jury had the right to consider that evidence in determining whether "sex was the motivating factor" in her discharge. The Eighth Circuit's decision to reverse Taylor's verdict was a clear refutation of all these arguments.

On Petitioners' appeal, the Eighth Circuit specifically rejected Petitioners' contention that *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995) en banc interpretation of the "continuing violation" doctrine was erroneous. The Eighth Circuit also found that evidence regarding "other women's claims of discrimination" should not be permitted as it was prejudicial. Although exclusion of some of the remaining evidence (such as clothing, equipment and facilities) was found to be erroneous, overall, the Circuit found it was "harmless". The Eighth Circuit then affirmed the District Court's rulings on Summary Judgment, Motions in Limine and Posttrial motions. App. A, pp. 3a-11a.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE "CONTINUING VIOLATION THEORY" IN DISCRIMINATION CASES PRECLUDES CONSIDERATION OF EVENTS OUTSIDE THE LIMITATIONS PERIOD FOR PURPOSES OF ESTABLISHING LIABILITY AND DAMAGES?

The Eighth Circuit's decision in *Kline*, applying *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995) en banc, voids the "continuing violation" theory in the Eighth Circuit leaving this Circuit alone among

the Circuits in its application of the doctrine to discrimination claims under Federal law. The Eighth Circuit by its application of the "continuing violation" theory as set forth in *Ashley* restricted Petitioners' ability to present evidence to the jury on the "totality of the circumstances" surrounding their claims of disparate treatment, sexual harassment and retaliation. This resulted in Petitioners being limited almost exclusively to events **within the 180/300** day time period. Petitioners contend this limitation of the evidence substantially[9] contributed to Wedow and Morgan losing entirely, and Kline and Taylor's losing their remaining claims. Even with the claims that Kline and Taylor did prevail upon, Petitioners contend the awards of damages would have been greater had this "other evidence" been presented to the jury.[10]

This truncated version of the "continuing violation" theory is contra to findings in other Circuits addressing the issue as well as to the one Missouri Appellate Court addressing the issue since the Eighth Circuit's ruling. Although the Eighth Circuit claims that *Ashley* does not eviscerate the "continuing violation" doctrine, the Eighth Circuit by permitting the District Court to set arbitrary time limits on "relevant background evidence" predating the

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9. Petitioners contend exclusion of the evidence regarding clothing, facilities, and what Petitioners knew had happened to other women and African-Americans in the KCMOFD also seriously impacted the ultimate verdicts. The "cumulative" effect of the exclusion of evidence cannot be underestimated as having substantially impacted Petitioners' claims as a whole.

10. The Eighth Circuit concluded they did not believe the exclusion of the evidence would have impacted the jury's ultimate verdicts, even those in favor of Kline and Taylor. App. A, pp. 10a-11a.

statutory time periods and by precluding recovery for events which occur outside the 180/300 day time period has essentially rejected the theory of "continuing violation" in all but explicit language. *See DeNovellis v. Shalala*, 124 F.3d 298, 307-309 (1st Cir. 1997); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143 (2nd Cir. 1997); *West v. Philadelphia Electric Company*, 45 F.3d 744, 754-56 (3rd Cir. 1995); *Brinkley-OBU v. Hughes Training, Incorporated*, 36 F.3d 336, 347-349 (4th Cir. 1994); *Berry v. The Board of Supervisors of L.S.U.*, 715 F.2d 971, 979-981 (5th Cir. 1983); *Bell v. Chesapeake & Ohio Railway Company*, 929 F.2d 220 (6th Cir. 1991); *Selan v. Kiley*, 969 F.2d 560, 564-566 (7th Cir. 1992); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108-1110 (9th Cir 1998); *Martin v. Nannie and Newborns, Inc.*, 3 F.3d 1410, 1414-1416 (10th Cir. 1993); *Beavers v. American Cast Iron Pipe Company*, 975 F.2d 792, 796-798 (11th Cir. 1992) and *Pollock v. Wetterau Food Distribution Group*, 1999 WL 619345 (Mo. App. E.D.) adopting *Draper* as the standard for Missouri state discrimination claims.

Berry, supra, referred to by many Circuits as the seminal Circuit Court case on "continuing violation" outlining the theory of "continuing violation", stated (*Id.* at 979-80):

> The theory may also be relevant to a plaintiff's remedy, for it has been stated that once having shown discrimination continuing **into** the actional period, . . . the plaintiffs may also recover for portions of the persistent process of illegal discrimination that **antedated** the limitations period.

(internal quotations eliminated, emphasis added).

Although the Supreme Court has not directly decided the issue, it has inferred that damages **for the entire time period** are to be considered when there is a "continuing violation" of a sexually hostile environment. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (considering acts of harassment spanning two and one half years) and *Meritor Sav. Bank. FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 48 (1986) (considering acts of harassment spanning a four year period.) Other Supreme Court cases addressing "continuing violation" seem to presume recovery for the entire liability period. *See United Airlines v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977); *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) and *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). This for the reason that damages generally flow from the period of liability covered, and artificial barriers on damages, unless statutorily imposed, have not heretofore been recognized to limit liability once liability is imposed.

The *Ashley* limitation on damages results in two problems: first, the jury may not assess damages for the "relevant background information" which it hears during the course of the trial;[11] and second, for that period of time for which they may assess damages, they must somehow segregate out the noncompensable damages affect on the compensable damages. This leaves the jury to speculate as to what sum is appropriate for those limited damages. Placed in that position, and following the trial court's directions not to "speculate", the jury is left with but one conclusion

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11. The jury was not told until the instructions were given that these events could not be compensated.

— nominal damages, as they did for Kline in this cases on her sexual harassment retaliation claims, or "no damages" — as they did for Wedow and Morgan — as to award otherwise might be "speculative" in violation of the District Court's jury instruction not to speculate. A logical extension would place a psychologist or psychiatrist testifying for a plaintiff in a hostile environment case in the almost impossible position of attempting to sever plaintiff's diagnosable emotional distress between "pre" and "within" 180/300 day events. A trial court could strike such expert testimony in a *Kumko/Daubert* hearing because of the speculative nature of attempting to "divide up" the emotional distress impact. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *Kumko Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

While Panels of the Eighth Circuit have held "a totality of the circumstances" must be considered in determining whether there is a hostile environment, *see Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997), Rehearing and Suggestion for Rehearing en banc denied (1998) and *Rorie v. United Parcel Service, Inc.*, 141 F.3d 757, 761 (8th Cir. 1998), and that evidence supporting a hostile environment should not be "compartmentalized", *see Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 355 (8th Cir. 1997), in effect Petitioners' claims have been "compartmentalized" by this distorted application of the "continuing violation" doctrine which arbitrarily cuts off the evidence a plaintiff may present to establish her discrimination claims.

II.

WHETHER A WOMAN MAY CLAIM AS PART OF HER "HOSTILE ENVIRONMENT" ACTS DIRECTED AT OTHER WOMEN, OR WOMEN IN GENERAL, OF WHICH SHE IS AWARE, BUT WHICH WERE NOT DIRECTED AT HER PERSONALLY, OR ALTERNATIVELY, MAY SHE USE SUCH EVIDENCE TO ESTABLISH INTENT AND MOTIVE ON THE PART OF THE EMPLOYER TO DISCRIMINATE?

The Eighth Circuit's creation of an artificial "judicial environment" by arbitrarily cutting off Petitioners' claims by its limited interpretation of the "continuing violation" doctrine is augmented by its rulings precluding evidence of what happened to other women of which Petitioners were aware.[12] The result of this erroneous preclusion of evidence

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12. The Eighth Circuit states that "other women's" experiences were considered. App. A at 11a. However, this is incorrect. Only one incident of dozens was ruled admissible and then for the limited purpose of demonstrating "knowledge by the city" of the atmosphere. Other women in the KCMOFD were permitted to testify **only** in the equitable relief hearing after the jury trial. Almost every women in the department testified about their own "hostile environments" and disparate treatment during their work experience in the KCMOFD. This led the trial court to enter an equitable relief order. (App. C at 32a-33a) which stated:

> The Court finds that there have been blatant and inexcusable incidents of improper activity; improper because they are prohibited by Title VII and improper because they should not be engaged in by public employees. In fact, the Court finds that some of the activities violate societal standards of decency in any

(Cont'd)

also substantially contributed to the dismissal on Summary Judgment of Wedow's hostile environment claim based upon sex and Morgan's hostile environment claim based upon race. Likewise, Petitioners claim that the exclusion of the evidence at trial for all the Petitioners resulted in jury verdicts for Respondent on the remaining of Wedow and Morgan's claims, as well as those claims not prevailed upon by Kline and Taylor. Why? Because, quite simply, the jury heard about an environment truncated by exclusionary rulings which left the remaining events to be viewed in a vacuum without the benefit of the context of what was happening to all women in the KCMOFD.

By precluding Petitioners from testifying about what they knew happened to "other women" in the KCMOFD the Eighth Circuit precluded the jury from understanding how Petitioners viewed alleged discriminatory acts directed at them. It precluded the jury from understanding whether

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> work environment, public or private. For instance, the Court finds that strippers and prostitutes have been brought to fire stations; female employees have had their breasts grabbed; male fire fighters watch X-rated videos (either on VCR's or on pay-per-view) on communal televisions in fire stations while on duty; (FN 4 omitted) copies of magazines depicting nude women are kept in fire stations; sexual slurs are used to refer to women, sexually suggestive jokes, pranks and comments occur on a frequent basis. These things violate Title VII. These are also things that public employees ought not be doing while on duty. (FN 5 omitted) These are things no employee ought to be doing in the workplace. Equitable relief is required to prevent these violations from occurring in the future and to protect Kline from further sexual harassment.

Petitioners' claims were anomalies, or part of a more pervasive atmosphere of sex discrimination in all its forms. Clearly, a woman's view of her workplace environment is made up of not only what happens to her personally, but what happens to other [women] of which she becomes aware. To suggest that this evidence should not be considered part of the "totality of the circumstances" is just a further "compartmentalization" of a plaintiff's environment, severely limiting the ability of that plaintiff to explain how she felt personally and thus establish derivative damages from liability. Just as importantly, precluding such evidence on the grounds it is "prejudicial", precludes a plaintiff from submitting what may be, as in this case, a large body of evidence which may tend to demonstrate the defendant's discriminatory animus, or establish "pervasiveness" such as to show "knowledge" on the part of management, or punitive damages under *Kolstad v. American Dental Association*, __ U.S. __, 119 S. Ct. 2118 (1999).

The Eighth Circuit's ruling on this issue is in contravention of numerous other Eighth Circuit Panel decisions which find this evidence relevant to such issues as: knowledge by the defendant of the conduct complained about; discriminatory animus; and corroboration of the plaintiff's subjective view of her environment as "hostile". *See Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014-15 (8th Cir. 1988); *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155 (8th Cir. 1990); *Kopp v. Samaritan Health Systems Inc.*, 13 F.3d 264 (8th Cir. 1993); *Kimzey v. Walmart Stores, Inc.*, 107 F.3d 568, 573-74 (8th Cir. 1997); *Howard v. Burn Brothers, Inc.*, 149 F.3d 835, 838 (8th Cir. 1998). *Carter v. Chrysler Corporation*, 173 F.3d 693, 701 n.7 (8th Cir. 1999); *Breeding v. Arthur J. Galagher & Company*, 164 F.3d 1151 (8th Cir. 1999).

The Eighth Circuit's rulings on this matter are, like its rulings on the "continuing violation" doctrine, in contradistinction to rulings in other Circuits. Illustrative of other Circuit's decisions is the recent case of *Hurley v. Atlantic City Police Department*, 174 F.3d 95, 108-09 (3rd Cir. 1999). The District Court permitted four women who had been associated with the police department to testify regarding pervasive harassment of women within the department even though the plaintiff did not witness any of these incidents nor become aware of the alleged harassment until after she commenced suit. The Third Circuit reasoned that such evidence was admissible because:

> It gave them [the jury] the opportunity to evaluate the adequacy of management's response to Hurley's complaints during the statutory period. It provided the jury with a sense of whether the events that took place during the statutory period were anomalous or accidental, or instead were part of a pervasive and severe pattern.

See also Perry v. Ethan Allen, Inc., *supra* at 151; *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995); *Baty v. Willamette Industries, Inc.*, 172 F.3d 1232, 1245 (10th Cir. 1999); and *Vance v. Southern Bell Telephone & Telegraph Company*, 863 F.2d 1503, 1511 (11th Cir. 1989). The District Court in *Leibovitz v. New York City Transit*, 4 F. Supp. 2d 144, 149-50 (E.D.N.Y. 1998) in permitting the claim of a women who had never personally suffered harassment but viewed it happening to others stated:

> **Personal** harassment is not the gravamen of a hostile work environment claim. To assume that

> a cause of action for hostile work environment excludes claims where the environment is hostile but the person complaining about the environment has not been personally attacked would make quid pro quo and hostile work environment virtually identical while unnecessarily restricting the layman's definition of "environment". Congress gave no indication that Title VII was designed to be so conflated. See e.g., Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (citing cases) "An aggrieved person obviously is any person aggrieved by any of the forbidden practices." Hackett v. McGuire Bros., 455 F.2d 442, 446 (3rd Cir. 1971) . . .

(emphasis added).

The Court in *Leibovitz*, *id.* at 151 cites to the Appellate decision in *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985) wherein the court stated:

> Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive.

And even cites to language from the Eighth Circuit case of *Hall*, *supra* at 1014-15:

> Congress evinced an intention to define discrimination in the broadest possible terms, and evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment.

Finally, the Eighth Circuit's rulings in this regard are clearly in direct contravention of dicta in several decisions of this Court. In *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201 (1998) this Court in determining what sorts of workplace behavior constitute discriminatory action stated:

> . . . careful consideration of the social context in which particular behavior occurs and is experienced by its target . . . [and it] often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.
>
> * * *
>
> [such evidence] is probative of whether conduct is severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive.

(quoting *Harris* at 510 U.S. 21, and *Meritor* at 477 U.S. at 67). And, in *Farragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) this Court recounted the evidence that "other female lifeguards" had "informal" talks with a supervisor about the misbehavior of Terry and Silverman.

Farragher suggests another reason why the evidence of what happens to "other women" is relevant in the context of these cases. After *Farragher*, if the defendant raises the affirmative defenses recited in *Farragher*, a plaintiff must

demonstrate that the complaint procedure was either inadequate or she had reason not to utilize it. Petitioners suggest that one of the ways to rebut the affirmative defense is to show either that other women who had complaints such as the plaintiff found the procedures to be inadequate or failed to use the procedure because it would prove fruitless to do so based upon their own experiences. Clearly, if this type of "other women" evidence is to come in to rebut defendant's affirmative defenses, there is no reason it should not come in to support defendant's knowledge of the environment, defendant's discriminatory animus, plaintiff's subjective view of her environment, the pervasiveness of the environment, and perhaps most importantly, that plaintiff's view of the environment was that of a reasonable women based upon the "totality of the circumstances".

Clearly, *Kolstad* gives yet another reason why evidence of discrimination directed at other women should be admissible. In *Kolstad* this Court interpreted 42 U.S.C. § 1981a(a)(1) and 1981a(b)(1) regarding the degree of proof necessary to establish punitive damages in Title VII actions. This Court found that the terms "malice" and "reckless" in the statute defining "punitive damages" went to the issue of the "actor's state of mind" and "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Id.* at 2124. It is clear from *Kolstad* that evidence supporting punitive damages should be based on a modified concept of common law principals of "agency" which do not penalize the defendant for its good faith efforts to prevent discrimination. *Id.* at 2127-28. However, clearly this Court has left this issue for further development by the District and Appellate Courts. One of the ways to show, however, the requisite mental state of the employer, is the pattern of

discrimination against a wide number of persons other than the plaintiff bringing the claim. Hence, evidence of what occurred to "other women" is clearly relevant to this issue.

Although the Eighth Circuit found that the addition of events happening to other women serves only to create "confusion" and "prejudices the defendant", App. A, pp. 11a-12a, it is the jury who ends up being confused and the plaintiff who ends up being prejudiced by the exclusion of this evidence. The jury is hampered in determining whether the events of which plaintiff claims are "isolated" or part of the defendant's overall intent to discriminate against women in the workplace. The plaintiff is prejudiced by being precluded from presenting evidence of discrimination directed towards other members of the protected class which might lend support to a finding of systemic discrimination. As for the argument of "prejudice" to the defendant, if the defendant is a violator of Title VII anything tending to show it violated Title VII or may be subject to punitive damages will be prejudicial and such evidence should not be precluded for that reason.

III.

WHETHER EVIDENCE THAT A PLAINTIFF IS TREATED MORE HARSHLY FOR *LESS* SERIOUS EVENTS IS SUFFICIENT TO ESTABLISH DISPARATE TREATMENT OR WHETHER IT IS NECESSARY THE PERSONS TO WHICH A PLAINTIFF COMPARES HERSELF FOR PURPOSES OF ESTABLISHING DISPARATE TREATMENT ARE TREATED LESS HARSHLY FOR THE *IDENTICAL* OFFENSE?

The Eighth Circuit's sole reason for reversing the verdict in Taylor's favor on her disparate treatment claim was that

the men to whom she compared herself in Administration[13] were "disciplined" for "conduct" issues while she was disciplined for "performance" issues, and therefore, she proffered no person in the nonprotected class who was "similarly situated" to her and treated more favorably. The Eighth Circuit cites *Boner v. Board of Commissioners*, 674 F.2d 693, 697 (8th Cir. 1982) as support for the proposition that "performance" and "misconduct" are not "similarly situated" instances that can be compared. This is a continuation of a line of cases in the Eighth Circuit which essentially have devolved the "similarly situated" method of proof in disparate treatment cases to mean that unless a plaintiff can demonstrate that the person with whom she is comparing herself in the nonprotected class is almost identical in all respects to herself in terms of job and the type of conduct for which she is treated less favorably, she cannot sustain her burden of proof. *See Smith v. Monsanto Chemical Co.*, 770 F.2d 719, 723 (8th Cir. 1985); *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994); *Ricks v. Riverwood International Corp.*, 38 F.3d 1016, 1018 (8th Cir. 1994); *Ward v. Procter & Gamble Paper Products Company*, 111 F.3d 558, 560 (8th Cir. 1997).

Boner, as well as this line of cases, cites to *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 263, 280-85, 96 S. Ct. 2564, 2578-81, 49 L. Ed. 2d 493 (1976) for this alleged proposition. *McDonald*, however, does not support this peculiar reading; rather *McDonald* states employees who have engaged in acts of "similar **seriousness**" may be compared. *Boner* extended that to state that "performance"

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13. The District Court excluded dozens of files with examples of Fire Suppression personnel who were kept on the job for far more serious offenses both on and off the job.

and "misconduct" can never be considered as evidence for "similarly situated" employees. A very recent decision of the Eighth Circuit revisits the language of *McDonald*, while disregarding the language quoted by the Eighth Circuit in its opinion from *Boner*. *See Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484 (8th Cir. 1998). In *Lynn*, the Eighth Circuit found that a plaintiff need only establish that he or she was treated differently than other employees whose violations were of "comparable seriousness" (citing to *Ricks*, *supra* at 1019 and *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir 1988)). These cases are a correct recitation of the law.

To rule, as the Eighth Circuit has in *Boner* and in this case, is to preclude a plaintiff from making a disparate treatment case when there is no one "similarly situated" to her. For example, in the case at bar, no one performed the same tasks as Taylor performed for the Fire Marshall's office. The only men in the Fire Marshall's office were inspectors and supervisors while the women were relegated to various clerical tasks. While the men were sometimes "counseled" for conduct issues, such as sexual harassment[14] and other violations of KCMOFD regulations, they were rarely if ever disciplined for failing to do their job properly despite the fact there were problems with the way they did their jobs. Even when disciplined for so called "conduct" issues, the "discipline" was rarely if ever probation and firing as in

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14. The City offered into evidence Taylor's entire personnel file which contained documents showing that men in the Fire Administration where she worked had been accused of sexual harassment but no disciplinary action had been taken by Taylor's supervisor against these men who also supervised these other men. This is additional evidence of sex discrimination which supports Taylor's verdict.

Taylor's case, but merely verbal counseling. Taylor, however, was harshly criticized for performance issues and ultimately terminated for them even though she had a 14-year prior history of satisfactory performance.

By denying Taylor the right to prove her disparate treatment case by showing that men were treated more favorably for more serious issues while she was treated less favorably for less serious issues, the Eighth Circuit effectively precluded Taylor from making a submissible case. This is not the law of disparate treatment. It is a barrier too high to overcome.

IV.

WHETHER IF PLAINTIFF IS UNABLE TO PROFFER "SIMILARLY SITUATED PERSONS" IN THE NONPROTECTED CLASS WHO WERE TREATED MORE FAVORABLY, PLAINTIFF CAN PROVE DISPARATE TREATMENT BY REBUTTING THE PROFFERED BUSINESS REASON AND SHOWING OTHER EVIDENCE OF DISCRIMINATION TOWARDS THE PROTECTED CLASS?

The Eighth Circuit's decision to reverse the verdict in Taylor's favor in less than a page solely on the grounds the men to whom she had compared herself were not "similarly situated" denied Taylor her right to prove her case by other means as provided by *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-46, 101 S. Ct. 1089, 1094-95, 67 L. Ed. 2d 207 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) and *Ryther v. KARE II*,

108 F.3d 832 (8th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 2510, 138 L. Ed. 2d 1013 (1997). The Eighth Circuit's brief opinion on Taylor's claims stopped its analysis of Taylor's verdict after finding that under no circumstances could a plaintiff compare issues of "performance" to issues of "conduct" for purposes of establishing "disparate treatment" based upon "similarly situated" persons. App. A, pp. 16a-19a.

The Eighth Circuit failed to consider entirely whether the jury might not have believed the reasons given for Taylor's dismissal given other evidence that they heard of Taylor's treatment as well as the "hostile environment" for all women in the department given the evidence they heard for Kline, Morgan and Wedow. None of this evidence about other women in the department and what had occurred to them was limited to their cases by any limiting instruction. The Eighth Circuit essentially ignored the District Court's finding that the jury could have believed that Taylor was an adequate secretary, did not have performance problems and that her equipment problems were technical as she claimed, and not performance based as Respondent claimed and that men who had performance issues were not terminated. App. D, pp. 49a-53a. The jury heard evidence that Taylor's supervisor had come from Fire Suppression where there was rampant sex discrimination as evidenced by the information received on the claims of Kline and Wedow. The City did not proffer instructions during trial limiting the jury's consideration of this evidence to Wedow and Kline's claims. Consequently, the jury was free to use **all** the evidence they heard to support an inference that Taylor's supervisor was motivated by Taylor's sex in reaching his decision to terminate her.

By terminating its analysis after finding the men to whom Taylor compared herself were not "similarly situated", the Eighth Circuit went beyond merely eviscerating Taylor's verdict which required the jury find that "sex was a motivating factor" in her termination.[15] It rejected the direction of McDonnell Douglas Corp., Burdine, Hicks and even its own decision in Ryther. Clearly, given the totality of the evidence the Eighth Circuit should not have reversed Taylor's verdict.

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15. The verdict director submitted stated in part:

> First, defendant treated plaintiff Betty Taylor differently than similarly situated males in the Fire Department on any one or more the following issues at any time between June 20, 1993 and July 1, 1997:
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> * * *
>
> c. Termination of Employment, and
>
> Second, defendant's treatment of plaintiff Betty Taylor on one or more of the above issues was adverse to plaintiff Betty Taylor, and
>
> Third, plaintiffs' sex, female, was a motivating factor in defendant's decisions.

An additional instruction that immediately followed the verdict director read:

> If you find in favor of plaintiff Betty Taylor under Instruction 65, then you must answer the following question on the verdict form with respect to those items (a) through (c) listed in Instruction 65 that you found to

(Cont'd)

V.

WHETHER CHAPTER 213 OF THE MISSOURI STATUTES PERMITS THE SUBMISSION OF PUNITIVE DAMAGES AGAINST A STATE ENTITY?

The Eighth Circuit while agreeing with Petitioners that it must be guided by the Missouri statute's language on punitive damages, refuses to read the statute as a whole claiming to do so "cobbles together" many different provisions of the statute. App. A at pp. 15a-16a. However, statutes are read as a whole, and not as discrete parts. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 112 S. Ct. 570, 116 L. Ed. 2d 578, *on remand*, 971 F.2d 641 (1991). Identical words used in different parts of the same act are intended to have the same meaning. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 115 S. Ct. 1061, 131 L. Ed. 2d 1, *on remand*, 53 F.3d 333 (1995). Courts are not authorized to rewrite a statute because they might deem its effect susceptible of improvement. *Badaracco v. C.I.R.*, 464 U.S. 3865, 104 S. Ct. 756, 78 L. Ed. 2d. 549 (1984).

When read as a whole, the statute is quite clear that an "employer" is included in the definition of who a plaintiff may claim punitive damages against. Based upon the Eighth Circuit's analysis, no statute should be read as a whole, but should be read in small increments. This is not the manner in which statutes have been read in the past and should not

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(Cont'd)

> exist: Has it been proved by the greater weight of the evidence that defendant would have treated plaintiff Betty Taylor differently than similarly situated males in the Fire Department with respect to these issues, regardless of her sex?

be so read now so as to deny Petitioners their punitive damages.

The relevant portions of Chapter 213 are set forth in the App. J, pp. 109a-112a. When the definition of "employer" at 213.010 is read in conjunction with "relief available" under 213.111, it is clear that punitive damages are permissible against the City.

Although the District and Appellate Courts found language in *Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968) is controlling, *Chappell* was decided on a policy basis, not upon a strict construction of the Missouri statute. It is not appropriate for the Missouri Court of Appeals, District Court or the Eighth Circuit to "improve upon" the Missouri statute as written. For this reason, punitive damages should be reinstated.

CONCLUSION

For the above and foregoing reasons Petitioners request this Court remand the case to the trial court for a new trial of Kline's, Wedow and Morgan's claims, order the trial court to reconsider the dismissed hostile environment claims of Wedow and Morgan and if a hostile environment is found order a new trial on those claims all consistent with a proper definition and instruction regarding the continuing violation and hostile environment; Order the reinstatement of the punitive damage awards; and Order the reinstatement of the verdict in Betty Taylor's favor, together with appropriate attorney fees.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED MAY 5, 1999

Kathleen KLINE, Anne Wedow, and Erma Morgan,

Appellants,

and

Betty Taylor,

Appellant/Cross-Appellee,

v.

CITY OF KANSAS CITY, Missouri, FIRE DEPARTMENT,

Appellee/Cross-Appellant.

Nos. 98-1593, 98-1846.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 14, 1999.

Filed May 5, 1999.

* * *

Before: LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

Appendix A

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Kathleen Kline, Anne Wedow, Erma Morgan, and Betty Taylor, each of whom was an employee of the Kansas City, Missouri, Fire Department, sued the department under Title VII of the Civil Rights Act of 1964, see 42 U.S.C. §§ 2000e through 2000e-17, and the Missouri Human Rights Act (MHRA), see Mo.Rev.Stat. §§ 213.010-213.139. (Although the named defendant is the Fire Department, we refer to the city as the defendant in this opinion for purposes of simplicity.) All four women claimed that they were disparately treated based on their sex, that they were subjected to a hostile work environment based either on their sex or their race, and that they were retaliated against for filing charges against the city and for opposing Fire Department practices.

The trial court excluded much of the plaintiffs' evidence in limine: No evidence was admitted of acts that occurred prior to 1989, of the experiences of other women employees of the Fire Department, or of alleged discrimination with respect to clothes and facilities. The trial court also granted partial summary judgment against Ms. Wedow and Ms. Morgan, dismissing their disparate treatment and hostile work environment claims.

At trial, Ms. Kline prevailed on part of her disparate treatment claim and on her hostile work environment claim and her retaliation claim. The jury awarded her approximately $47,000 in compensatory damages and $150,000 in punitive damages on her disparate treatment claim, $1 in nominal damages and $100,000 in punitive damages on her hostile

work environment claim, and $1 in nominal damages and $50,000 in punitive damages on her retaliation claim. Ms. Taylor prevailed on part of her disparate treatment claim, and the jury awarded her approximately $96,000 in compensatory damages and $100,000 in punitive damages. The jury found for the city on the remaining claims of Ms. Kline and Ms. Taylor, and on the retaliation claims of Ms. Wedow and Ms. Morgan. The trial court subsequently granted the city's motion to vacate the punitive damages awarded to Ms. Kline and Ms. Taylor.

The plaintiffs appeal the evidentiary exclusions noted above, the jury instructions given in light of those exclusions, the summary judgment rulings against Ms. Wedow and Ms. Morgan, and the order vacating the award of punitive damages. The city cross-appeals, claiming that there was insufficient evidence to support the judgment in favor of Ms. Taylor. We affirm the trial court with respect to the plaintiffs' appeal but reverse the judgment in favor of Ms. Taylor's disparate treatment claim. We remand the case for the entry of appropriate orders.

I.

Employment discrimination claims of the kind involved here are barred if a plaintiff fails to file a timely charge with the appropriate federal or state administrative agency. Evidence of discrimination is ordinarily admissible only with respect to acts within the statutory limitations period preceding the filing of the charges. The plaintiffs in this case, however, sought to admit evidence of events predating the

limitations period, maintaining that they could do so because they were complaining of continuing violations.

We have long recognized that a claim may be timely if it is based on an ongoing violation that began before the limitations period began but continued into it, see Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 167-68 (8th Cir.1995) (en banc), and that evidence of events "occurring outside the limitations period may . . . be admissible . . . when the incidents are part of a continuing violation," Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 572 (8th Cir.1997). A violation is continuing if it consists of " 'an ongoing pattern or practice of discrimination,' " rather than an amalgamation of discrete, isolated instances. Rorie v. United Parcel Service, Inc. 151 F.3d 757, 761 (8th Cir.1998), quoting Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1303 (8th Cir.1997), cert. denied, __ U.S. __, 118 S.Ct. 2370, 141 L.Ed.2d 738 (1998) (emphasis omitted).

We have held, moreover, that "[e]ven if a plaintiff is unable to show a continuing violation, . . . instances of harassment occurring outside the [limitations] period may be admissible to provide relevant background to later discriminatory acts." Rorie, 151 F.3d at 761. Damages, however, may be recovered only with respect to events that occurred within the limitations period. Ashley, 66 F.3d at 168 ("[r]elief back to the beginning of the limitations period strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past"); see also Kimzey, 107 F.3d at 572-73.

Various of the plaintiffs contend that the trial court misapplied the principles applicable to continuing-violation cases in several ways. We turn first to the trial court's exclusion of evidence about any events that occurred before January 1, 1989 (more than four years before the limitations period began). The trial court's order excluding that evidence explicitly declined to do so with respect to Ms. Wedow, Ms. Morgan, and Ms. Taylor, and thus on appeal we consider this issue only with respect to Ms. Kline. See Fed.R.App.P. 10(2), Fed.R.App.P. 28(e). Ms. Kline asserts that the trial court's cutoff date of January 1, 1989, for evidence on her disparate treatment and hostile work environment claims was arbitrary and that for those claims the trial court should have admitted all evidence concerning her work since she was first hired at the Fire Department.

The city contends that Ms. Kline's offer of proof was insufficient. "An offer of proof serves dual purposes: (1) to inform the [trial] court and opposing counsel of the substance of the excluded evidence, enabling them to take appropriate action; and (2) to provide an appellate court with a record allowing it to determine whether the exclusion was erroneous and whether [the] appellant was prejudiced by the exclusion." Thomas v. Wyrick, 687 F.2d 235, 239 (8th Cir.1982), cert. denied, 459 U.S. 1175, 103 S.Ct. 824, 74 L.Ed.2d 1020 (1983). Having reviewed the offer of proof that Ms. Kline submitted to the trial court on this issue, we believe that it was adequate to serve both of these purposes. We have not considered the depositions that were cited in the offer of proof at trial but not provided to this court on appeal.

We believe, furthermore, that the trial court properly concluded that no pre-1989 events could be considered part of a continuing violation relevant to Ms. Kline's disparate treatment claim. Two of those events involved discipline that Ms. Kline received in 1977, but because of the time lapse between 1977 and 1989, the trial court quite correctly found that the 1977 events involved isolated acts that were not part of a continuing violation. The remaining incident occurred in 1986 and concerned an injury that Ms. Kline was told to ignore. We agree with the trial court that that incident was also merely an isolated act. Even if the trial court erroneously excluded the 1986 event, moreover, the error is harmless. Because Ms. Kline could recover only for incidents that occurred within the limitations period, the 1986 event could have been used only as background evidence and, in our view, is highly unlikely to have affected the verdict of the jury on Ms. Kline's disparate treatment claim.

As for Ms. Kline's hostile work environment claim, however, we believe that the trial court should have allowed evidence of pre-1989 events. In her offer of proof on this issue, Ms. Kline provided evidence of a consistent chain of discriminatory acts and working conditions that were sufficient to constitute a continuing violation that began prior to 1989. The trial court should therefore have admitted that evidence as "relevant background," Kimzey, 107 F.3d at 573, at the very least. Ms. Kline prevailed on the issue of liability on this claim, however, so the only harm she could have suffered from the exclusion of this evidence would be with respect to damages. In this circuit, though, damages may not be predicated on events that occur prior to the limitations period. See id. at 572-73; Gipson v. KAS Snacktime Co.,

83 F.3d 225, 230 (8th Cir.1996); and Ashley, 66 F.3d at 168. The error was therefore harmless.

Ms. Wedow and Ms. Morgan assert that the trial court improperly failed to consider events occurring outside the statutory limitations period when it granted summary judgment to the city on their hostile work environment claims. It is clear from the face of the trial court's orders granting summary judgment, however, that it did in fact consider such evidence, along with events that occurred within the statutory period. The trial court determined that the events in question involved isolated acts rather than parts of a continuing violation. We believe that the trial court was correct in its conclusion.

Ms. Wedow's hostile work environment claim was based on a series of events that ended in 1986 and on individual incidents that occurred in 1989 and 1993. The trial court determined that these were isolated incidents that did not amount to a continuing violation. Given the length of time that transpired between these three acts, we affirm this ruling. Ms. Morgan's hostile work environment claim was based on a series of acts that ended in 1981, subsequent acts that caused her to accept a voluntary demotion in 1987, and acts that occurred several years later. The trial court found that all these acts were isolated rather than parts of a continuing violation. We agree.

Ms. Wedow and Ms. Morgan further contend that all of this evidence should have been considered "relevant background," Kimzey, 107 F.3d at 573, quite apart from any role as evidence of a continuing violation. We disagree. The

evidence in question involved isolated acts that occurred several years before the limitations period began; those acts thus had little or no probative value but did present a substantial risk of confusion of the issues and unfair prejudice. See Fed.R.Evid. 402, Fed.R.Evid. 403. In our view, if that evidence had been admitted, an appreciable risk would have existed that the jury would award damages because of acts for which the statute of limitations had run, or that the jury would confuse the relevant acts with continuing violations.

II.

In a related vein, Ms. Kline, Ms. Wedow, and Ms. Morgan contend that the trial court erred in instructing the jury that liability and damages on any claim could be predicated only on acts that took place within the limitations period. As noted above, our cases are clear that a plaintiff may be compensated only for such acts. See Kimzey, 107 F.3d at 572-73; Gipson, 83 F.3d at 230; and Ashley, 66 F.3d at 168. The plaintiffs argue, nonetheless, that Ashley and the cases applying its principles have recently been contradicted by Jenson, 130 F.3d at 1287, because, according to the plaintiffs' brief on appeal, "in Ashley it is clear that the plaintiff was limited to recovering to the beginning of the limitation period while in Jenson it is clear that relief is predicated on acts that predated the statute of limitations period."

The plaintiffs have misread the cases. The Jenson opinion held only that the decision about liability (whether or not a plaintiff will recover) could be based partially on

time-barred events, not that a plaintiff could actually recover damages for those events. See Jenson, 130 F.3d at 1302-03. Damages are not thus "predicated on" time-barred events as the plaintiffs contend. The cases are not, therefore, in conflict, and the instructions limiting the recovery of damages to events that happened within the limitations period were therefore correct. See Gipson v. KAS Snacktime Co., 171 F.3d 574, 575-76, 576 n. 3 (8th Cir.1999).

Ms. Kline, Ms. Wedow, and Ms. Morgan challenge the jury instructions on the disparate treatment and retaliation claims. The plaintiffs maintain that the instructions improperly directed the jury to find for the plaintiffs only if disparate treatment or retaliation took place during the statutory limitations period.

The disparate treatment claims were pleaded as continuing violations but relied on discrete acts of discrimination within the limitations period. Evidence from outside that period was therefore admissible as "relevant background," Kimzey, 107 F.3d at 573, but could not be the basis for liability on the disparate treatment claims unless the disparate treatment occurred during the limitations period. That is what the instructions in question required. The benefit of a continuing-violation theory in suits that rely on discrete acts is that a plaintiff may "challenge ongoing discriminatory acts even if similar illegal acts could have been challenged earlier and are thus time-barred," Ashley, 66 F.3d at 168, not that defendants may be held liable for acts outside the limitations period. The challenged instructions were thus not erroneous.

With respect to the retaliation claims, no continuing violation was pleaded. Those claims thus had to have been based on discrete acts within the limitations period. The relevant instructions could not therefore have been infirm on account of any consideration related to a continuing-violation theory, and, accordingly, the trial court properly instructed the jury that liability for retaliation could be based only on acts that occurred during the limitations period.

An instruction relevant to the defendant's liability on Ms. Kline's hostile work environment claim was, however, erroneous. That instruction directed the jury to find for Ms. Kline if conduct occurring within the limitations period met the criteria for a hostile work environment. But when, as here, some of the unlawful acts could establish a continuing violation, a jury need not find that conduct only within the limitations period established the defendant's liability on a hostile work environment claim. Instead, the jury may base part of its determination that a hostile environment existed on evidence of events outside the limitations period, as long as the violation continued into that period and included at least one unlawful act during that period. See Jenson, 130 F.3d at 1303. The trial court therefore erred in instructing the jury on Ms. Kline's hostile work environment claim.

We believe nevertheless that the error was harmless. Because the trial court granted summary judgment to the city on the hostile work environment claims of Ms. Wedow and Ms. Morgan, the offending instruction applied only to the hostile work environment claims of Ms. Kline and Ms. Taylor. Ms. Kline prevailed on her hostile work environment claim, and Ms. Taylor does not argue that this instruction

was erroneous. Furthermore, although Ms. Kline also contends that the instruction prejudiced her with respect to damages, we disagree, because even in a continuing violation, damages may not be awarded for acts that are time-barred.

III.

The plaintiffs also contend that the trial court should have admitted evidence of discrimination that other women suffered at the Fire Department. We note initially that the trial court did in fact admit evidence tending to show that the city employees who allegedly discriminated against the plaintiffs also discriminated against other women. The trial court admitted that evidence under Fed.R.Evid. 404(b) because it was relevant with respect to the defendant's knowledge of unlawful conduct toward the plaintiffs and its refusal to remedy it. With respect to other employees of the Fire Department, however, we fail to see how evidence of any discrimination by them against women other than the plaintiffs would tend to prove that the plaintiffs were discriminated against. See Fed.R.Evid. 402. Any probative value of this evidence, moreover, would be substantially outweighed by the threat of confusion of the issues and unfair prejudice. See Fed.R.Evid. 403; see also Callanan v. Runyun, 75 F.3d 1293, 1298 (8th Cir.1996) (upholding a similar exclusion).

Ms. Kline, Ms. Wedow, and Ms. Morgan assert that evidence about employees other than those who allegedly discriminated against them should have been admitted as relevant to motive, opportunity, intent, or knowledge on the

part of the city. See Fed.R.Evid. 404(b). We agree with the trial court that the acts of people who did not supervise or allegedly discriminate against the plaintiffs (and who in most cases did not even work in the same area as the plaintiffs) are not probative of the city's motive, opportunity, intent, or knowledge. What little probative value such evidence might have, in any case, would be substantially outweighed by the threat of confusion of the issues and unfair prejudice. See Fed.R.Evid. 403.

IV.

Finally, Ms. Kline, Ms. Wedow, and Ms. Taylor contend that the trial court should have admitted evidence of discrimination with respect to clothing and facilities as relevant to their hostile work environment claims. We agree.

The EEOC complaint did allege a hostile work environment, and although it did not specifically recite the excluded evidence in support of that claim, the law does not restrict a plaintiff at trial to the evidence recited in an EEOC complaint. "In a hostile work environment claim, evidence concerning all circumstances of the complainant's employment must be considered." Kimzey, 107 F.3d at 573. The treatment of the plaintiffs with respect to clothing and facilities was a part of their work environment and therefore should have been considered in evaluating their hostile work environment claims.

We believe, however, that the error was harmless. With regard to Ms. Kline, we observe first that she prevailed on the issue of liability with respect to her hostile work

environment claim. The only harm that she could have suffered from the exclusion of the clothing and facilities evidence, therefore, would have been relevant to damages. Pursuant to a jury instruction that directed the jury to award Ms. Kline nominal damages if it found in her favor on liability but decided that her injuries had no monetary value, the jury awarded her only nominal damages ($1). The acts that led to this award included numerous unwanted sexual advances and insults. The evidence that Ms. Kline contends should have been admitted concerned the poorly fitting clothing, the failure of supervisors to respond to requests to buy firefighting clothing designed for women, unequal bathroom facilities, and the lack of privacy in the bathrooms. Those alleged conditions were manifestly less severe and pervasive than the ones for which Ms. Kline prevailed on liability, and we thus believe that the jury would have declined to award any additional damages for them. The only potential harm to Ms. Kline, therefore, would be in the calculation of punitive damages. Since the trial court vacated the award of punitive damages, however (a ruling that we affirm below), any error here was harmless.

The trial court correctly found in its summary judgment order that Ms. Wedow's hostile work environment claim was based on only one act but that there was no evidence from which a jury could conclude that Ms. Wedow's supervisors were aware of that act. Only the clothing and facilities evidence would have remained, therefore, even if considered, to defeat summary judgment on Ms. Wedow's hostile work environment claim. That evidence concerned the poorly fitting clothing, the lack of firefighting clothing designed for women, deficient bathroom facilities for women (there

was no shower), and the lack of privacy in the bathrooms and the bunk area. Ms. Wedow's claim could have survived summary judgment only if these conditions were "sufficiently severe or pervasive 'to alter the conditions of [the plaintiff's] employment and create an abusive working environment.' " Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir.1982).

We do not believe that the evidence on clothing and facilities was sufficient to carry that burden. It does not tend to prove the level of severity that we have previously found necessary to sustain claims of this sort. For example, in Rorie, 151 F.3d at 762, we found that the facts that the plaintiff alleged were "on the borderline of those sufficient to support a claim," where those facts consisted of the plaintiff's supervisor frequently brushing up against her, telling her that she smelled good, and patting her on the back. We think that those allegations were more serious than the general discomfort that Ms. Wedow alleged with respect to clothing and facilities, and we therefore believe that even if the evidence on clothing and facilities had been considered, Ms. Wedow's hostile work environment claim could not have survived summary judgment. Any error in excluding that evidence was therefore harmless.

It is unclear to us whether Ms. Taylor appeals on this issue. We doubt, however, that the admission of the clothing and facilities evidence would have bolstered her claim in any event. Unlike Ms. Kline and Ms. Wedow, who were firefighters and often had to wear firefighting clothing, and

spend nights and take showers at the fire station, Ms. Taylor was a clerical worker. The conditions of which Ms. Kline and Ms. Wedow complain in their hostile work environment claims were altogether irrelevant to Ms. Taylor's work environment (in fact, there is no evidence that she was even subject to these conditions). Any error in this regard was therefore harmless with respect to her as well.

V.

Ms. Kline and Ms. Taylor also contest the trial court's order vacating the jury's award of punitive damages under the MHRA. They maintain that the city failed to raise and properly preserve this issue at trial because the city made no motion for judgment as a matter of law with respect to punitive damages. See Fed.R.Civ.P. 50(a)(1). That rule, however, governs motions for judgment as a matter of law based on insufficient evidence and is therefore irrelevant in this context. The city objected to punitive damages at trial on the ground that the statute does not authorize them (not that insufficient evidence existed to support such an award) and objected to the jury instruction on punitive damages, see Fed.R.Civ.P. 51, and therefore raised and properly preserved the issue.

We believe that the trial court was correct in vacating the punitive damages awards. Because the burden of a punitive damages award against a municipality ultimately falls on the taxpayers, and thus will fail to deter future harmful activity by the municipality itself, punitive damages are not usually recoverable against a municipality in Missouri. See Chappell v. City of Springfield, 423 S.W.2d

810, 814-15 (Mo.1968), and Angelo v. City of Hazelwood, 810 S.W.2d 706, 707 (Mo.Ct.App.1991). A municipality in Missouri is subject to punitive damages only if a statute specifically provides that it is. See, e.g., Chappell, 423 S.W.2d at 813-14.

Ms. Kline and Ms. Taylor argue that the MHRA does in fact specifically provide for punitive damages against municipalities, because the act's definition of "employer" "includes the state, or any political or civil subdivision thereof," see Mo.Rev.Stat. § 213.010(7), and because another section of the act provides that a court may award punitive damages to a prevailing party, see Mo.Rev.Stat. § 213.111.2. But the MHRA is a voluminous statute with many provisions and definitions. See Mo.Rev.Stat. §§ 213.010- 213.139. We believe that a result cobbled together from different sections of the statute is insufficiently explicit under the Missouri cases to overcome the presumption against punitive damages when a municipality is a defendant that has been found liable. We therefore reject the plaintiffs' contentions in this respect.

VI.

The city cross-appeals the judgment entered in favor of Ms. Taylor on her disparate treatment claim, arguing that there was insufficient evidence of intentional discrimination. Ms. Taylor responds that the city failed to preserve this issue for appeal because the city did not renew the motion for judgment as a matter of law, see Fed.R.Civ.P. 50(b), that it made at the close of the plaintiffs' evidence, see Fed.R.Civ.P. 50(a). She cites Pulla v. Amoco Oil Co., 72 F.3d 648 (8th Cir.1995), for the proposition that a party that fails to move

for judgment as a matter of law at the close of all of the evidence is barred by Fed.R.Civ.P. 50(b) from arguing the sufficiency of the evidence post-trial or on appeal.

That case is inapplicable here. First of all, in Pulla, 72 F.3d at 655-56, the appellant failed to make any motion for judgment as a matter of law prior to submission of the case to the jury. It is not even contended that that is the case here. Instead, it is the form of the motion that Ms. Taylor contests. She asserts that, although the city made both oral and written motions for judgment as a matter of law at the close of the plaintiffs' evidence, it "merely renewed them" at the close of its own evidence and again at the close of all of the evidence.

Ms. Taylor argues that these renewals did not satisfy the rule's requirement that motions specify the grounds on which the moving party is relying. See Fed.R.Civ.P. 50(a)(2). We disagree. Once a sufficient motion for judgment as a matter of law has been made, nothing in the law requires the movant continually to make arguments or to file written motions repeating the details of the original over and over again. We believe that it is sufficient for the movant, as the city did here, simply to renew the motion generically.

The city's substantive argument is that its motion for judgment as a matter of law should have been granted because Ms. Taylor failed to present sufficient evidence of intentional discrimination. Ms. Taylor's theory of the case throughout the trial was that she was treated differently from similarly situated men. The city contends that she did not

prove disparate treatment because the males to whom she compared herself were not, in fact, similarly situated to her.

Ms. Taylor bore the burden of proving that she and the male employees to whom she compared herself at trial were " 'similarly situated in all relevant respects,' " Smith v. Monsanto Chemical Co., 770 F.2d 719, 723 (8th Cir.1985), cert. denied, 475 U.S. 1050, 106 S.Ct. 1273, 89 L.Ed.2d 581 (1986), quoting Meyers v. Ford Motor Co., 659 F.2d 91, 93 (8th Cir.1981). Ms. Taylor, a clerical employee, was accused of poor job performance. The three men to whom she claims she was similarly situated were J.W.S. (a fire inspector), P.C. (a firefighter), and L.G. (a fire dispatcher), each of whom was accused of specific rule violations. We have held that employees accused of poor job performance are not similarly situated to employees accused of misconduct. Boner v. Board of Commissioners, 674 F.2d 693, 697 (8th Cir.1982) (plaintiff's poor job performance not similar to misconduct in the form of embezzlement).

J.W.S. was verbally abusive to an employee of the city Finance Department while on duty, and was involved in an altercation with a security guard (for which he was charged with assault) while in uniform and off duty. His supervisor charged him with violations of the personnel rules and of the Fire Department Rules and suspended him until the assault case was decided. After the suspension, J.W.S. was told that he could either resign or face charges for verbal abuse. P.C. was charged with sleeping on the job and violating the fire code by bringing his vehicle inside a building when acting as a fire guard at an event. His supervisor removed his overtime card from the fire guard

box (the card was later returned because it had not been made clear that bringing a vehicle inside the building was a violation). L.G., who served under a different supervisor and in a different facility from Ms. Taylor, had his pay docked for reading another worker's e-mail.

The performance-related matters for which Ms. Taylor was terminated (inadequate typing skills, mistakes in correspondence, and poor time management, among others) are not similar to the specific instances of misconduct described above. Ms. Taylor offered no evidence to demonstrate that she was treated differently from these men, or any other men, with respect to job performance. She was not, therefore, similarly situated to these men in all relevant respects, and the verdict in her favor cannot stand.

VII.

For the reasons stated, we affirm the judgment of the trial court in all respects on the plaintiffs' appeal but reverse the judgment in favor of Ms. Taylor's disparate treatment claim. We remand the case for the entry of appropriate orders.

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI DATED AND FILED FEBRUARY 17, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

CASE NUMBER: 94-0723-cV-W-3

KATHLEEN KLINE, et al.,

Plaintiffs,

V.

CITY OF KANSAS CITY MISSOURI,

Defendant.

AMENDED JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Counts I and IV — in favor of Kathleen Kline and awarded $47,134 in actual damages; Counts II and V — in favor of Kathleen Kline and awarded $1.00 in actual damages; Counts III and VI — in

favor of Kathleen Kline and awarded $1.00 in actual damages; Counts VII and X — in favor of Defendant; Counts IX and XII — in favor of Defendant; Counts XV and XVIII — in favor of Defendant; Counts XXIII and XXVI — in favor of Betty Taylor and awarded $96,196 in actual damages; Counts XXIV and XXVII — in favor of Defendant; Counts XXV and XXVIII — in favor of Defendant.

Order dated February 17, 1998 denies in part and grants in part equitable relief as summarized in the Order.

February 17, 1998

R.F. Connor
Clerk

s/ [illegible]
(By) Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION REGARDING PLAINTIFFS' MOTION FOR EQUITABLE RELIEF DATED AND FILED FEBRUARY 17, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 94-0723-CV-W-3

KATHLEEN KLINE, et al.,

Plaintiffs,

v.

CITY OF KANSAS CITY, MISSOURI,

Defendant.

ORDER

Pending is Plaintiffs' Motion for Equitable Relief. After reviewing the arguments presented by the parties and by the International Association of Fire Fighters Local Union No. 42 (the "Union") appearing as an *amicus*, the Court grants Plaintiffs' Motion in part and denies it in part.

To put the Motion in context, it is important to keep in mind that the jury in this case found in favor of Plaintiff Kathleen Kline on her claim of disparate treatment in the awarding of overtime, opportunities to work out of class

("WOC"), promotion to Battalion Chief, sexual harassment, and retaliation. The jury also found in favor of Plaintiff Betty Taylor on her claim that she was discharged because she was a woman. The jury awarded these Plaintiffs monetary damages to compensate them through the date of the verdict (which was November 21, 1997).

I. LEGAL STANDARDS

When a Plaintiff prevails under Title VII, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). "Title VII has vested broad equitable powers in the federal courts to fashion a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Additionally, . . . victims of discrimination are entitled to the most complete relief possible, including placement in positions comparable to ones that they were denied, and determination of seniority and other rights as of the date that their rights were violated." *Gilbert v. City of Little Rock*, 799 F.2d 1210, 1215 (8th Cir. 1986) (quotations omitted). With these general principles in mind, the primary areas of relief requested by Plaintiffs are addressed below.

II. RELIEF SPECIFIC TO PLAINTIFF KATHLEEN KLINE

The relief principally requested by Kline relates to a promotion to Battalion Chief. The jury determined that Kline

was denied this promotion because of her gender, and Title VII generally favors equitable relief in the form of a promotion in these circumstances. *E.g.*, *Ingram v. Missouri Pacific R.R.*, 897 F.2d 1450, 1456-57 (8th Cir. 1990); *Gilbert*, 799 F.2d at 1215; *Equal Employment Opportunity Comm'n v. Rath Packing Co.*, 787 F.2d 318, 334-35 (8th Cir. 1986); *Equal Employment Opportunity Comm'n v. M.D. Pneumatics, Inc.*, 779 F.2d 21, 23 (8th Cir. 1985). Defendant contends that Kline is not qualified for the position of Battalion Chief and for that reason argues that a court-ordered promotion is inappropriate. Defendant's argument is foreclosed by the jury's determination that Kline's gender, and not her lack of qualifications, was the reason she was not promoted. Moreover, the Court has independently determined that Kline is qualified for the position of Battalion Chief and that there are no special circumstances of the sort described in *Rath Packing* that indicate a promotion is inappropriate. Consequently, Kline must be awarded a promotion to Battalion Chief in order to accord her complete relief under Title VII.

The record demonstrates that the first promotion to Battalion Chief after Kline reached the top of the promotion list (and the discarding of that promotion list) occurred on February 20, 1994. With that in mind, **the Court orders that:**

1. Kline shall be immediately promoted to the rank of Battalion Chief, with seniority rights (including, but not limited to, bidding rights) as if she had been promoted on February 20, 1994.

Appendix C

2. Kline's salary, effective November 21, 1997, shall be the salary of the individual who was first promoted to the rank of Battalion Chief after Kline's promotion list was discarded. (This individual's identity will not be revealed in this Order for privacy reasons, but the Court is confident the parties are able to identify the individual in question).

3. As a Captain, Kline has been eligible for and has received overtime for which she has been compensated with money. Instead of overtime, Battalion Chiefs receive "Adjustment Time" (commonly referred to as "A" time), which is measured (as the name suggests) in time. To make her whole, Kline is entitled to a credit to her "A" time account, but this credit must be discounted by the amount of overtime pay she received between February 20, 1994 and November 21, 1997. Because overtime is measured in money and "A" time is measured in time, calculation is required in order to determine the amount of time to be credited to Kline's account. The calculation will be based upon the pay and "A" time awarded to the individual who was first promoted to Battalion Chief after Kline's promotion list was discarded. The calculation is to be performed as follows:

   a. Upon promotion, the individual was paid $4,043 a month, which equals $48,516 per year. When this figure is divided by 2080 (the number of hours worked a year, assuming a forty hour work week and fifty-two weeks a year), the hourly pay for that individual was $23.33 per hour.

b. Defendant is to calculate the amount of "A" time that individual was credited between the date of his promotion and November 21, 1997. The value of that time will then be calculated by multiplying that time by the hourly wage of $23.33.

c. Next, the amount of overtime Kline earned between February 20, 1994 and November 21, 1997 will be deducted from that figure. Finally, to convert the resulting dollar figure back into time, the resulting figure will be divided by $23.33. The quotient will be the amount of time that is to be credited to Kline's "A" time account. In no event shall the amount of "A" time to be credited be less than zero.

The Court acknowledges that using the initial pay figure of $23.33 is imprecise because it fails to account for pay raises awarded to that individual. However, it is the most accurate figure in the record that can be used to calculate the amount of "A" time. The inability to incorporate wage increases in this calculation inures to Kline's detriment; however, as this is her request for equitable relief, it was her obligation to provide evidence to support more precise and fair calculations.

4. Defendant shall expunge all references to the fact that Kline was not promoted from the discarded list from all of Defendant's records, including but not limited to Kline's personnel record, wherever those records are kept.

5. In order to compensate Kline for the true cost of monetary damages, Defendant shall pay Kline prejudgment (simple) interest at the rate of 5.46% per annum, for a total prejudgment interest award of $4825.35.[1]

III. RELIEF SPECIFIC TO PLAINTIFF BETTY TAYLOR

The jury determined that Taylor was terminated based on her gender. Full and complete relief for this transgression requires that she be returned to her position if possible. Although Taylor's return to a position in the Fire Department may not be desirable, it must be remembered that the defendant in this case is the City of Kansas City, Missouri and not the Fire Department. Inasmuch as the City of Kansas employs clerical workers in departments and offices outside the Fire Department, and in light of the lack of evidence demonstrating that the relationship between Defendant and Taylor is unusually hostile or antagonistic. Defendant can (and must) find a suitable job for Taylor.

Defendant contends that Taylor is not entitled to reinstatement (or the customary alternative of front pay)

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1. This figure was calculated by multiplying the damage award for Count 1 ($23,567.00) by the interest rate of 5.46%, resulting in a figure of $1,286.76. Then, since the jury's verdict was rendered approximately three years and nine months after the first promotion following the discardation of the promotion list, this figure was multiplied by 3.75, resulting in prejudgment interest of $4,825.35. The Court is purposely not awarding prejudgment interest on Kline's nominal damage awards.

because she failed to request front pay in her jury instructions. Defendant's argument fails because prospective relief such as reinstatement or front pay is to be awarded by the Court and not the jury. *Newhouse v. McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997) ("We agree with the Second Circuit's cogent analysis and now expressly hold that front pay, including the determination of how much front pay to award, is an equitable issue for the court. The district court erred in this case by submitting the front pay determination to the jury.").

Defendant also contends that Taylor is not entitled to further relief because she is disabled and incapable of working. The Court disagrees. There is no doubt that Taylor suffers from certain limitations due to her health — however, she operated under these limitations while she worked for Defendant until she was terminated because of her gender. If she could work for Defendant before, she can work for Defendant now; there was simply no evidence that her medical condition is substantially different now than it was when she was terminated.[2]

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2. Defendant makes much of the fact that Taylor has filed a claim for social security benefits. It must also be remembered, however, that Taylor has also (while under oath) requested reinstatement. The fact that she has filed for social security benefits is a factor in assessing Taylor's credibility, but it does not automatically foreclose reinstatement. After considering all of the evidence and observing Taylor during the trial and during her testimony, the Court finds that her testimony that she desires to return to work and believes herself capable of returning to work is credible. The Court further finds that Taylor's dire financial and personal straits (brought on in no small part by her unlawful termination)

(Cont'd)

Appendix C

In light of the above, and with the purpose of providing Taylor complete relief for her unlawful termination, **it is ordered that:**

1. Defendant shall offer Taylor a job at the same grade and level she held at the time she was terminated on July 6, 1994. This job shall not be in the Fire Department. The job offer shall occur within fifteen days of this Order.

2. Defendant shall credit Taylor with seniority as if she had not been terminated.

3. Defendant shall credit Taylor with sick leave and annual leave as if she had not been terminated.

4. Taylor's salary effective November 21, 1997, shall be the salary she was receiving on July 6, 1994 plus any cost of living adjustments awarded by Defendant to all employees between July 6, 1994 and November 21, 1997.

5. Defendant shall expunge all references to Taylor's termination from all of Defendant's records, including but not limited to Taylor's personnel record, wherever these records are kept.

(Cont'd)
prompted her application for social security benefits. Finally, even if Taylor has a genuine subjective suspicion that she may qualify for disability benefits, there has been no adjudication that she is, in fact, disabled. The Court takes her at her word and finds that she is ready, willing and able to work.

6. In order to compensate Taylor for the true cost of monetary damages, Defendant shall pay Taylor prejudgment (simple) interest at the rate of 5.46% per annum, for a total prejudgment interest award of $9,848.07.[3]

III. OVERTIME POLICY

Plaintiffs request that the Court alter Defendant's policy and procedures for the awarding of overtime. Plaintiffs' request is denied.

Of the four Plaintiffs, only Kline prevailed on a claim involving the discriminatory awarding of overtime. She has received complete relief in the form of an award of monetary damages. Further equitable relief "should not be considered unless the record shows a real threat of a future violation of the law or contemporary violation of a nature likely to continue or recur." *Webb v. Missouri Pacific R. Co.*, 98 F.3d 1067, 1068 (8th Cir. 1996) (quotations omitted); *see also Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1230 (10th Cir. 1997) (quoting *United States v. W.T. Grant Co.*, 345 US. 629, 633 (1953)). There was no credible evidence that discriminatory awarding of overtime is a common problem. In fact, there was no credible evidence that anyone other than Kline experienced this problem. The

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3. This figure was calculated by multiplying Taylor's damage award ($48,098.00) by the interest rate of 5.46%, resulting in a figure of $2,626.15. Then, since the jury's verdict was rendered approximately three years and three and one half months after the Taylor was discharged, this figure was multiplied by 3.292, resulting in prejudgment interest of $8,645.29.

Court also notes that the awarding of overtime is to be determined in accordance with facially nondiscriminatory procedures set forth in the Memorandum of Understanding ("MOU") between Defendant and the Union. This does not automatically bar this Court from imposing injunctive relief, but this fact — combined with the paucity of evidence that a recurring problem exists — persuades the Court that there is little threat of future discrimination in the awarding of overtime. Consequently, there is no justification for the Court to alter Defendant's current overtime practices.

IV. WORKING OUT OF CLASS

Plaintiffs also requests that the Court alter Defendant's policies for permitting Fire Department employees to work out of class ("WOC"). Although the MOU provides no guidance for the awarding of WOC opportunities, the Court is not persuaded that injunctive relief is warranted. The awarding of WOC opportunities requires consideration, in part, of factors related to firefighting that are beyond the ability of this Court to evaluate sufficiently so that a policy can be crafted. The Court is reluctant to impose standards for the awarding of WOC opportunities at the risk of public safety. Although this decision appears to leave intact a system that permits those who wish to discriminate to carry out their desires, the Court is not persuaded that the risk justifies the relief sought by Plaintiffs. There was scant evidence that other women are denied WOC opportunities based on their gender, so the Court finds that the risk of future violations necessary to justify injunctive relief is not present.

Appendix C

V. PROMOTIONS

Plaintiffs ask this Court to adopt an entirely new system for awarding promotions. As with the previous requests for injunctive relief, the Court finds injunctive relief of this sort unjustified. First, as with WOC opportunities, the Court is unwilling to establish standards governing promotions at the risk of public safety. Second, promotions are governed by a facially non-discriminatory policy that helps safeguard against those who wish to discriminate. Finally, and most importantly, the Court is not persuaded that there is a risk of future discrimination in the awarding of promotions.

VI. SEXUAL HARASSMENT

Plaintiffs seek a variety of forms of injunctive relief based on Kline's success on her claim for sexual harassment. The Court agrees that some further equitable relief is warranted, but not to the extent Plaintiffs request.

Unlike the situation involving overtime, WOC or promotions, the Court finds that there is more than a threat that sexual harassment will continue; the Court is certain that sexual harassment will continue unless steps are taken to prevent it. The Court finds that there have been blatant and inexcusable incidents of improper activity; improper because they are prohibited by Title VII and improper because they should not be engaged in by public employees. In fact, the Court finds that some of the activities violate societal standards of decency in any work environment, public or private. For instance, the Court finds that strippers and prostitutes have been brought to fire stations; female

employees have had their breasts "grabbed"; male firefighters watch X-rated videos (either on VCRs or on pay-per-view) on communal televisions in fire stations while on duty;[4] copies of magazines depicting nude women are kept in fire stations; sexual slurs are used to refer to women; sexually suggestive jokes, pranks and comments occur on a frequent basis. These things violate Title VII. These are also things that public employees ought not be doing while on duty.[5] These are things no employee ought to be doing in the workplace. Equitable relief is required to prevent these violations from occurring in the future and to protect Kline from further sexual harassment.

Defendant has adopted two sexual harassment policies, but they have obviously failed to change employee behavior. The latest policy was circulated on November 20, 1997 — the day before the jury returned its verdict and well before the hearing on equitable relief. Already, there are indications that the new policy is not being taken seriously.

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4. With respect to this finding, the Court notes that a Title VII violation is not cured when, as was the case in one fire station, the male employees purchase a separate television for one female firefighter so she can be exiled to the bunk area to watch TV while the men watch dirty movies in the common area. The notion of "separate but equal" facilities is not credited in the law. *Cf. Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 493-95 (1954).

5. The Court also finds that these things occur so often and so openly that it is implausible that they have not been observed by Captains, Acting Captains, and Battalion Chiefs, yet there is little indication that management level employees have ever stepped in and reported or addressed these situations — despite acknowledgment that this is their obligation under Defendant's policies.

Appendix C

The reasons for Defendant's past failures are clear. The Court finds that dissemination of the policies has been haphazard at best. Furthermore, there has been little serious discussion about the policies and the conduct that they are designed to prevent. (In the case of the latest policy, efficacy may also have been hampered because the timing of its circulation strongly suggests its primary purpose was to forestall an order of equitable relief from this Court rather than to effect any meaningful change in behavior.). Consequently, even when employees read the policy, they do not comprehend the effect the policy should have on their behavior. Training has occurred only occasionally and often has not been taken seriously by those in attendance, further preventing any understanding of the difference between permissible and impermissible behavior. Although the need for training has been acknowledged by the Fire Director, there is no present plan of implementation.

The Court has reviewed Defendant's current sexual harassment policy (the "Policy") and concludes that there is no need to re-write it. While a more perfect" policy might be crafted, the Court believes this one is adequate. The problem is, as it always has been, in communicating its terms and meaning to employees of the Fire Department. Consequently, the Court will not impose wholesale changes in Defendant's policy.[6] However, some minor changes in Defendant's policy must be made.

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6. The Court is tempted to enjoin Defendant and its employees from bringing prostitutes to fire stations, watching X-rated videos in fire stations, grabbing female employees' breasts, or engaging in any of the other conduct described in this Order. On the other hand, it is disheartening to think that such an Order is necessary.

(Cont'd)

Appendix C

Currently, those wishing to complain about sexual harassment or discrimination can complain to either (1) the immediate supervisor or first level supervisor who is not involved in the complaint, (2) the City Affirmative Action/ EEO Officer ("EEO Officer"), or (3) the Director of Labor & Employee Relations in the Human Resources Department. Specifically, the Court is concerned about that provision of the Policy permitting Fire Department employees to report to the EEO Officer. Among the EEO Officer's duties is the responsibility to respond to charges of discrimination filed with the Equal Employment Opportunity Commission ("EEOC") and the Missouri Human Rights Commission ("MHRC"). This creates (despite Defendant's protestations to the contrary) a clear conflict of interest: is the EEO Officer supposed to be investigating and trying to resolve complaints on *behalf* of the complainant, or is the EEO Officer investigating complaints and developing the City's defense *against* the complainant's charges? This conflict of interest is more egregious because employees are not aware that the EEO Officer has the responsibility to defend the Defendant before the EEOC and MHRC. Consequently, **Defendant is ordered to** alter the Policy so that none of the people to whom employees are directed to report complaints are also charged with the duty of responding to the EEOC or MHRC or defending Defendant before those agencies.[7]

(Cont'd)

Ultimately, the Court concludes that this conduct is clearly prohibited not only by Title VII but also by Defendant's sexual harassment policy. The Court will therefore not "list" examples of prohibited conduct (which, in any event, could never be exhaustive).

7. Defendant can comply with this directive by altering the EEO Officer's job description so that he or she does not have the

(Cont'd)

Appendix C

The Court also concludes that efforts to eliminate sexual harassment are hampered by Defendant's failure to maintain a central record of complaints and actions taken on those complaints. Accordingly, **Defendant shall maintain**, in the Fire Director's office, a file for each cadet and employee in the Fire Department. Each file will contain the following:

1. Forms signed by the cadet/employee acknowledging receipt of the sexual harassment policy (and any addendums or amendments) and that the policy and/or addendum has been read by the individual.

2. Records demonstrating that the cadet/employee has attended training as required by this Order.

3. Records of complaints filed by that cadet/employee against any cadet/employee regarding alleged violations of the sexual harassment policy, together with any other documents pertaining to that specific complaint.

4. Records of complaints filed against that cadet/employee regarding alleged violations of the sexual harassment policy, together with any other documents pertaining to that specific complaint.

5. Documentation of any investigation, report and/or assessment of discipline (if any) arising from the

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(Cont'd)
responsibility to respond to the EEOC or MHRC or defend the City against formal administrative charges. Whether it chooses this solution over any other viable alternative is up to the Defendant.

complaint made by that cadet/employee or made against that cadet/employee.

6. These files shall not be destroyed until five years after the cadet/employee resigns or otherwise leaves Defendant's employ.

In order to facilitate the creation of this centralized file, all complaints (whether oral or written) of sexual harassment involving Fire Department employees — regardless of who receives the initial complaint — must forward copies or reports of the complaint to the Fire Director. Additionally, copies of all other items listed above are to be forwarded to the Fire Director. These files can be examined by the Fire Director and/or his designee responsible for administering discipline. Further, and employee may examine his or her own file. Beyond this, the files are to remain confidential except as otherwise authorized by law (including court order).

Finally, although the Court declines to institute all of the policy changes and workplace rules suggested by Plaintiffs, the Court (despite the sentiments expressed in footnote 6, *supra*) is chagrined to conclude that one policy change is required. Current facilities occasionally require men to be in women's restrooms (and vice versa). In some fire stations, this is because there are only unisex restrooms. In other cases, space constraints require storage of male firefighters' equipment in women's restrooms. This, as might be expected, creates situations in which men intrude upon women who are showering or otherwise using the facilities. Defendant's failure to take simple steps to address this

problem have created, strangely, the need for a **Court Order requiring** as follows: Defendant is ordered to install locks on all restroom doors.

With these changes in mind, it is necessary to address the issues of dissemination and training. To address these problems, **it is ordered that**

1. Within six months of this Order, Defendant shall have required *all* Fire Department employees to attend a minimum of four hours of training/education regarding the requirements and prohibitions of Title VII and the sexual harassment policy. This training will also become a permanent part of the training offered at the Fire Academy, thereby insuring that future recruits receive this training. Defendant shall also take steps to insure that civilian employees (and other new employees who do not attend the Academy) receive this training within three months of their employment.

2. Management employees shall receive a minimum of two additional hours of training/education regarding their responsibilities under Title VII and the sexual harassment policy. Defendant shall also take steps to insure that all employees promoted to management (or hired into such positions from outside the Fire Department) receive this training within three months of their promotion/employment.

3. Defendant shall provide a minimum of one hour of additional training/education to all employees of the

Fire Department every two years. The requirements of this paragraph will end in the year 2005 (although the Court hopes by that time Defendant recognizes the wisdom of this continuing education).

4. The curriculum for this education/training, as well as details regarding its implementation (e.g., who will conduct the training, length of sessions, class size, etc.) will be established by a seven person committee. John R. Phillips of the law firm of Blackwell Sanders Matheny Weary & Lombardi, LLP is hereby appointed as Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure. The Special Master's duties will consist of chairing and advising the committee and reporting the committee's progress and decisions to the Court at the end of each month of the Committee's existence. All decisions of the committee shall be subject to approval by the Court. The Special Master's other powers shall be those enumerated in Rule 53(c).

5. The Fire Director will also serve on the committee. The committee's remaining members will be selected, subject to this Court's approval, by the Fire Director as follows:

   a) The composition of the remaining five members must consist of one female Battalion Chief, one female Captain, one female firefighter or fire apparatus operator, one male Captain, and one male firefighter or fire apparatus operator.

   b) Within ten days from the date of this Order, the Fire Director shall forward to the Court a list of

his selections for the committee. The list should be accompanied by a biographical sketch no more than one page in length. In considering the Fire Director's selections, the Court will focus primarily on indications that those nominated are well-respected by their peers (and superiors and subordinates, as is applicable).

5. Within five days of the Court's approval of the committee's composition, the Special Master and the Fire Director shall communicate with each other in order to schedule the committee's first meeting.

6. The committee will dissolve once the first training/education session has been completed. Within sixty days of the committee's dissolution, the Special Master shall file a statement documenting his fees and costs.

7. Once approved by the Court, the Special Master's fees and costs will be assessed against the Defendant.

VII. ATTORNEY FEES

The Court has previously ordered Plaintiffs' counsel to file a Motion for Attorney Fees within thirty days of the ruling on Plaintiffs' Motion for Equitable Relief. Defendant shall have thirty days after the Motion for Fees is filed to respond to the Motion. During that time, counsel for both sides should meet to determine to what extent, if any, they can reach agreement on issues related to the awarding of fees (e.g., time expended, hourly rates, discounting for degree

of success, etc.). Any agreements that can be reached should be separately filed as a joint stipulation.

Plaintiffs shall have fifteen days to file a reply to Defendant's response.

VIII. CONCLUSION

The relief granted by this Order accomplishes the two principal goals of Title VII. First, it affords the prevailing plaintiffs complete relief for the discrimination and harassment they have suffered. Second, it addresses the conditions that have heretofore prevented Defendant from remedying the sexual harassment that has been — and if unchecked will continue to be — commonplace in the Fire Department.[8]

Defendant is further advised that the Court intends for its Order to be acted upon immediately so that the deadlines established by this Order will be met. The Court will be reluctant to extend the deadlines established in this Order. Moreover, the Court announces that it is unlikely that a stay will be granted; although Defendant may request a stay and attempt to persuade the Court that a stay should be entered, Defendant should not expect a favorable response. Consequently, Defendant should not delay implementation of this Order anticipating that the Court will grant a stay.

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8. The Court has not addressed all of the requests for relief made by Plaintiff. In some instances, the Court has crafted obvious replacements. To the extent that some requested relief is not specifically addressed, it should be deemed denied.

The Court also hopes Defendant takes to heart the lesson taught in this case. If Defendant wants to avoid similar complaints, then it must take an active role in preventing sexual harassment in the Fire Department. If it does not make a serious and successful effort to educate Fire Department employees about proper and improper behavior, Defendant will find itself defending a similar suit in the immediate future. Saddest of all is that the transgressions found by the Court are not minor or technical violations of Title VII. They are major violations. Not only do they violate federal law, but they exceed the bounds of good taste, common decency, and ordinary manners. To date, Defendant has taken a passive role in trying to prevent sexual harassment. It is hoped that this Order will guide Defendant in the right direction.[9]

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9. The Court has this final observation. When elementary school children are asked what they want to be when they grow up, invariably "a firefighter" is among the most frequent answers. It is easy to blame the present situation in the Fire Department on a few miscreants who have yet to escape adolescence. However, they will not hear this sermon. Problems of this nature can be solved only through leadership, And, whether these problems are resolved will depend upon leadership. That Fire Director Brisbin was named to hand-pick most of the members of the training committee is a deliberate choice. The Court believes that Chief Brisbin genuinely wants the Fire Department to have a diverse composition where minorities and women are accepted as equals. If the Court is mistaken, then being a firefighter in Kansas City will cease being a noble calling. If the Court is right, children will continue to announce that their life's ambition is to be a firefighter. For the sake of these women and for the sake of the public, which firefighters serve and protect, the Court hopes its trust is not misplaced.

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 2/17/98

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION REGARDING POST-TRIAL MOTIONS DATED AND FILED FEBRUARY 17, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 94-0723-CV-W-3

KATHLEEN KLINE, et al.,

Plaintiffs,

v.

CITY OF KANSAS CITY, MISSOURI,

Defendant.

ORDER

Pending are numerous post-trial motions; this Order is intended to rule on all post-trial motions except Plaintiffs' Motion for Equitable Relief.

1). Plaintiffs' Motion for Setting of Bond (Doc. # 407) is denied. The Motion is premature because Defendant has not yet appealed the judgment in this case, let alone filed a request for stay pursuant to Federal Rule of Civil Procedure 62(d). In any event, even if a request for bond were proper at this juncture, the Court would not set a bond in the amount

requested by Plaintiffs because that sum (1.5 times the jury's verdict) is excessive. If the Court were to grant a stay and institute a bond (an issue that need not be decided at this time), the bond would likely be for a nominal amount.

2). Plaintiff Kathleen Kline's Motion to Amend Judgment Entry of November 24, 1997 (Doc. # 418) is granted. Kline correctly points out that during the trial the Court granted her motion to reconsider the grant of summary judgment on her claim of sexual harassment under the Missouri Human Rights Act ("MHRA"). The Clerk's Judgment reflects the original grant of summary judgment and does not incorporate the Court's reinstatement of this claim.

3). Plaintiff Anne Wedow's Motion for Reconsideration of the Court's Grant of Summary Judgment (Doc. # 419) is denied. Specifically, she seeks reconsideration of the Court's grant of summary judgment with respect to her claims of sexual harassment based exclusively on her testimony during the equitable portion of this case. To put matters in context, this case was filed on August 3, 1994 and discovery closed approximately three years later. In opposing Defendant's Motion for Summary Judgment on this claim, Wedow did not mention these facts or provide record cites for many of the incidents she testified to during the equitable portion of his trial.[1] She how asks the Court to revisit settled issues

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1. For instance, although the record contained evidence that prostitutes and/or strippers were brought into certain fire stations, there was never any indication that Wedow witnessed such events — at least, not until she testified at the equitable portion of the trial. Similarly, evidence that male firefighters grabbed her breasts was not brought to the Court's attention when the summary judgment motion was pending.

based upon her own failure to properly substantiate the existence of a disputed issue of material fact when the summary judgment motions were being considered.

The Court will not grant the relief requested. Wedow's failed to present evidence about these incidents in opposing Defendant's summary judgment motion. The evidence cannot now be considered to reverse this Court's decision made months ago and based on evidence before it at that time. This conclusion is buttressed by the fact that the belatedly offered evidence came from Wedow; the failure to present this evidence at the proper time cannot be corrected in this manner.[2]

4). All Plaintiffs have filed a Motion for New Trial. For the most part, the Motion (Doc. # 454) raises issues that were discussed and ruled prior to or during the trial. The Court sees no need to elaborate further on these decisions at this time. The challenges raised in the Motion are rejected for the same reasons previously stated.

One issue unique to the Motion for New Trial is Plaintiff Kline's request for additur on her awards for sexual harassment and retaliation. She speculates that "[t]he jury obviously found it difficult to assess amounts for this claim even though they [sic] found by clear and convincing

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2. Wedow also presents an arguments based on the Eighth Circuit's recent decision in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997). The same argument is also raised in Plaintiffs' Motion for New Trial. For ease of discussion, *Jenson* will be discussed later in this Order when the Motion for New Trial is addressed.

evidence that the city had violated the plaintiff Kline's [sic] rights on these two claims. Perhaps the jury, because of lack of experience, felt incapable of making such an award." She ignores, however, the equally plausible possibility that the jury awarded precisely the amount of damages it deemed appropriate. The Court sees nothing in the record to justify additur.

The final argument unique to the Motion for New Trial is based upon the Eighth Circuit's recent decision in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997). Plaintiffs contend that *Jenson* requires a new trial because it permits an award of damages for conduct that occurred outside the time limits for filing an administrative claim under Title VII.

The relationship between the continuing violation theory and the proper measure of damages has been discussed several times by the Eighth Circuit. In an en banc decision, the Court concluded its discussion of this issue by declaring that "[r]elief back to the beginning of the limitations period strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past." *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995). Relying on *Ashley*, the Eighth Circuit later rejected an appellant's argument "that, if he proves a pattern of racial harassment constituting a hostile work environment, he may recover damages for the entire period that this violation occurred, including any portion that occurred more than 180 days before he filed his Charge of Discrimination, or more than two years before he filed this lawsuit." *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 230

(8th Cir. 1996).[3] Then, a mere nine months before *Jenson* was decided, the Eighth Circuit relied on both *Ashley* and *Gipson* to support the proposition that "[a] sex discrimination complainant may recover for any discriminatory act for which the statute of limitations has not expired." *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 572 (8th Cir. 1997).

In *Jenson*, the continuing violation theory is discussed only with respect to the district court's dismissal of Diane Hodge's complaint. Although most of *Jenson* discusses issues related to damages, this portion of the opinion does not and Plaintiffs' characterization of *Jenson* as a "damages case" does not necessarily and automatically render the entire opinion applicable to damages. The Court of Appeals held that Hodge had "established that she was subjected to it least one incident of harassing behavior during the statutory period [and so] we find that her claim is part of a continuing violation and is not time barred." *Jenson*, 130 F.3d at 1303. *Jenson*'s discussion of the continuing violation theory does not mention the Eighth Circuit's prior decisions in *Ashley*, *Gipson* or *Kimzey*, nor does it even discuss the measure of damages Hodge would be entitled to. Even if the *Jenson* panel could overrule the three prior appellate decisions, a fair reading of the opinion demonstrates that this was not the court's intent. This Court therefore concludes that *Jenson* has no application to the issue of damages in a continuing violation situation and does not require a new trial in this case.[4]

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3. The time limits identified in this quote relate to the time limits under the MHRA.

4. Wedow also argues that *Jenson* requires vacation of the summary judgment on her harassment claims because "[t]his court (Cont'd)

5). Defendant has filed a Motion for Judgment as a Matter of Law or for New Trial with respect to Plaintiff Kline (Doc. # 410) and two Motions for New Trial with respect to Plaintiff Taylor (Doc. # 411 and Doc. # 415). For ease of discussion, these motions will be discussed collectively.[5]

These motions are denied to the extent that they challenge the sufficiency of the evidence for those claims on which these plaintiffs prevailed. Although the Court expressed concern about the sufficiency of the evidence with respect to some of the claims presented to the jury, the counts with which the Court was primarily concerned were ruled in favor of Defendant. With respect to those verdicts in favor of the Plaintiffs, the Court concludes that there was sufficient

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(Cont'd)
admitted that the final event occurred in 1993 . . . ." This mischaracterizes the Court's holding: the Court's Order granting summary judgment on this claim identified one incident that occurred in 1993, but held that it did not constitute sexual harassment. The Court also held that the 1993 incident was too disconnected in time from the prior incidents to qualify as the end point in a continuing violation. Finally, to the extent that Wedow now asserts other incidents should be considered, the argument is foreclosed because (as discussed earlier) they were not pointed out to the Court in Wedow's response to the summary judgment motion.

5. The Court rejects Plaintiffs' arguments that Defendant waived these arguments by failing to make appropriate Rule 50 motions during the trial. First, except as specifically mentioned in the discussion, the Court believes that these issues were properly raised at the appropriate times. Moreover, Plaintiffs have waived the right to make this objection, based on counsel's statements to that effect on the record.

evidence to support them. Specifically with respect to Betty Taylor, there was sufficient evidence to permit the jury to conclude that Taylor did a satisfactory job as a secretary, that any performance problems she had were properly attributed to equipment problems and that her superiors knew about those equipment problems. The jury could also have concluded that other individuals who had performance problems were not terminated.[6] With respect to Kathleen Kline, the jury reviewed the evidence regarding the awarding of overtime and, based on that evidence, could have concluded that Kline had less opportunities than similarly situated male firefighters. The jury could have rejected Defendant's proffered explanations for discarding the promotion list and concluded that the decision was based on a desire to prevent a woman from becoming a Battalion Chief. There was also ample evidence to support the jury's verdict on Kline's sexual harassment claim. The Court cannot say that the jury's verdicts were so contrary to the weight of the evidence that a miscarriage of justice occurred or that, as a matter of law, a verdict in favor of Defendant was mandated.

These motions are also denied to the extent that they allege errors in the jury instructions. Specifically, Defendant contends that Instruction No. 65 incorrectly stated the law when it included, as an element in Taylor's disparate treatment claim, a directive that the jury consider whether "plaintiff's sex, female, was a motivating factor in defendant's decision." Defendant contends that this was improper because it was "obvious" that the jury could only

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6. Defendant's arguments regarding a comparison of Taylor to individuals who received light duty are irrelevant because the jury did not find that Taylor was discriminatorily denied light duty.

answer "yes" to this inquiry. Interestingly, this argument is limited to Taylor's disparate treatment claim and was not raised with respect to Kline's disparate treatment claim even though identical language appears in Instruction No. 22. More importantly, the language criticized by Defendant appears virtually verbatim in Model Instruction 5.01.

Defendant also argues that Instruction No. 66 (the "same decision" instruction) was improper. What has been said with respect to Instruction No. 65 can be repeated here. In addition to the fact that Defendant did not raise a similar objection with respect to Instruction No. 23 (the "same decision" instruction given for Kline's disparate treatment claim), the instruction actually given closely tracks the model instruction.

Finally, it must be pointed out that the instructions given by the Court are nearly identical to those proposed by Defendant in its third set of proposed instructions. The key portion of Instruction No. 65 (the verdict director) sets forth the following elements:

> First, defendant treated plaintiff Betty Taylor differently than similarly situated males in the Fire Department on any one or more of the following issues at any time between June 20, 1993 and July 1, 1997:
>
> a. Discipline, and/or
>
> b. Light Duty, and/or
>
> c. Termination of Employment, and

> Second, defendant's treatment of plaintiff Betty Taylor on one or more of the above issues was adverse to plaintiff Betty Taylor, and
>
> Third, plaintiff's sex, female, was a motivating factor in defendant's decisions.

Defendant's proposed verdict director contained the following elements:

> First, defendant
>
> denied plaintiff opportunities to work light duty; or
>
> disciplined plaintiff; or
>
> terminated plaintiff; and
>
> Second, plaintiff's sex was a motivating factor in defendant's decisions.

There is no discernible difference between the elements in the Court's verdict director and those proposed by Defendant. Similarly, Instruction No. 66 is virtually identical to Defendant's proposed "same decision" instruction. Instruction No. 66 says:

> If you find in favor of plaintiff Betty Taylor under Instruction 65, then you must answer the following question on the verdict form with respect to those items (a) through (c) listed in

> Instruction 65 that you found to exist: Has it been proved by the greater weight of the evidence that defendant would have treated plaintiff Betty Taylor differently than similarly situated males in the Fire Department with respect to these issues, regardless of her sex?

Defendant proposed the following:

> If you find in favor of plaintiff under Instruction No. __, then you must answer the following question in the verdict form: Has it been proven by the greater weight of the evidence that defendant would have denied plaintiff opportunities to work light duty; or disciplined plaintiff; or terminated plaintiff regardless of her sex?

Once again, the Court sees no real difference between the two instructions. Although Defendant's proposal is different because it specifies the three areas of purported discrimination (light duty, discipline and termination), Instruction No. 66 accomplishes the same task by referring the jury to items (a) through (c) in Instruction No. 65.

Next, Defendant contends that the award of punitive damages is improper under Missouri law.[7] Despite some

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7. Punitive damages are not available under Title VII because Defendant is "a government, government agency or political subdivision." 42 § 1981a(b)(1). If punitive damages are available in this case, it can only be because the MHRA permits such an award.

concerns with the manner in which this issue has been raised,[8] the Court concludes not only that the issue is properly before the Court but that Defendant's arguments are meritorious. The MHRA permits an employee to file suit against his or her employer, which is defined to include "the state, or any political or civil subdivision thereof, ..." Mo. Rev. Stat. § 213.010(6). The MHRA also permits an award of punitive damages in appropriate cases. *Id.* § 213.111.2. Read in combination, these provisions permits employees to recover punitive damages in suits against their employers, and includes municipalities in the definition of "employers."

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8. Defendant did not file a Motion to Strike, nor did it file a Motion to Dismiss. Defendant filed four separate motions for summary judgment — one for each Plaintiff — but none of them raised this issue. Defendant resisted certain depositions by asserting, among other arguments, that it was not subject to punitive damages, but Defendant did not provide any legal support for this argument and the Court specifically refrained from addressing this issue pending development of the Defendant's legal argument. *See* Order dated March 11, 1997. Defendant objected to Plaintiffs' proposed jury instructions on punitive damages but said nothing more than the fact that Defendant objected to the instruction; Defendant provided no legal support for its objection. *See* Doc. # 338. The first, and prior to trial the only, time that Defendant provided legal support for its position appears in Defendant's Trial Brief (Doc. # 339), which was filed at 5:00 p.m. on October 29, 1997. This occurred a mere two working days before the trial commenced and represented the first time the Court became aware of any possible legal support for Defendant's argument.

Ideally, this issue should have been raised in some sort of dispositive motion long before the case went to trial. Nonetheless, the Court concludes that Defendants have raised this issue and that a ruling at this time is warranted.

However, the MHRA does not specifically declare that municipalities are subject to liability for punitive damages. The MHRA's failure to take this extra step makes the award of punitive damages in this case improper.

In *Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968), the Missouri Supreme Court considered a case in which the plaintiffs, *inter alia*, sought punitive damages from the City of Springfield for willfully and maliciously failing to abate a nuisance, i.e., the city's sewage disposal plant. The Court noted "the general rule that in the absence of a statute specifically authorizing such recovery, punitive or exemplary damages are not recoverable against a municipal corporation." 423 S.W.2d at 813. The Court relied heavily upon an 1877 case (*Hunt v. City of Booneville*, 65 Mo. 620 (1877)) that discussed a suit against the city based on a statute prohibiting trespass. In *Hunt*, the Missouri Supreme Court held that held that although a municipality could be sued under the trespass statute, it was not subject to the trespass statute's provision for treble damages. *Chappell* acknowledged that there was hardly any case law on the subject since *Hunt* was decided but concluded that it was still good law.

In deciding that punitive damage awards against municipalities contravenes public policy, the *Chappell* Court rejected a variety of policy-based arguments in favor of permitting punitive damages against municipalities. 423 S.W.2d at 814. The Court ultimately held that punitive damages were not available, regardless of the egregiousness of the city's conduct in operating its sewage disposal plant because there was "no statute authorizing the recovery of

punitive damages against the municipality" under this cause of action. This conclusion was not altered by the fact that the city could be held liable for actual damages, or the fact that non-municipal defendants were subject to punitive damages.

A similar result was reached in *Angelo v. City of Hazelwood*, 810 S.W.2d 706 (Mo. Ct. App. 1991), which involved claim against a municipality for violating Mo. Rev. Stat. § 537.330. This statute permits suits against a municipality and permits a victorious plaintiff to recover treble damages. However, the statute does not clearly declare that a municipality was subject to the treble damage provision. Consequently, the Missouri Court of Appeals held that, based on *Chappell* and *Hunt*, "in the absence of a statute specifically authorizing such recovery, punitive damages are not recoverable against the municipal corporation." 810 S.W.2d at 707.

Despite the sparse law on the subject, the few cases that do exist cause this Court to conclude that a municipality is not subject to an award of punitive damages absent a specific statutory declaration to that effect. It is not enough for a statute to impose liability for compensatory or actual damages even if the statute *generally* permits an award of punitive damages; there must be a specific declaration that the municipality can be held liable for punitive damages. *E.g.*, *Chappell*, 423 S.W.2d at 813-14; *Angelo*, 810 S.W.2d at 707; *see also Euge v. Trantina*, 422 F.2d 1070, 1074 (8th Cir. 1970) (dicta). These cases also demonstrate that the MHRA lacks the specificity required to sustain the award punitive damages in this case. Just like the statutes involved

in the cases discussed above, the MHRA generally permits an award of punitive damages and permits suits against municipal corporations. However, also like the statutes involved in the cases discussed above, the MHRA does not *specifically* permit an award of punitive damages against municipal corporations. Consequently, the Court concludes that an award of punitive damages is not available against the Defendant under the MHRA, and the jury's award of punitive damages cannot stand.

Plaintiffs counter with a variety of policy-based arguments to justify awarding punitive damages in this case. These arguments are persuasive, but they have already been considered and rejected in *Chappell*. The Missouri Supreme Court is the final authority on the interpretation of Missouri law, and it would be improper for this Court to credit arguments about the proper meaning of Missouri law when those arguments have already been specifically rejected by the state's highest court.

Plaintiff's reliance on *Kizer v. Curators of University of Missouri*, 816 F. Supp. 548 (E.D. Mo. 1993) is also misplaced. It is not even clear that *Chappell* applied in that case because *Chappell* discussed the liability of municipalities and the University of Missouri is not a municipality. Furthermore, it is not clear that the district court in *Kizer* permitted an award of punitive damages against the university. In *Kizer*, there were three defendants; in addition to the university, the plaintiff had sued the dean and the chairperson of her department. Read in context, it appears that the motion before the court was a motion to dismiss filed by the two individual defendants and not by the

university. Although the court's discussion of punitive damages does not clearly indicate which party or parties requested dismissal of that claim, other portions of the opinion indicate that the motion was filed just by the dean and the chairperson. In any event, *Kizer* cannot be understood as holding that an award of punitive damages against a municipality is proper under the MHRA.

In conclusion, the Court holds that the MHRA does not specifically permit an award of punitive damages against a municipality, and for that reason such an award is improper under Missouri law. The jury's award of punitive damages must be vacated.

Defendant's final two arguments are related:[9] both involve claims that documents that were not admitted into evidence were sent to the jury room while the jury deliberated. Specifically, Defendant contends that an incompletely redacted Exhibit 225 was permitted to go to the jury room and that Exhibit 510M was permitted to go to the jury room when it was not even admitted during the trial. The Court concludes that Defendant has failed to fulfill its obligation to demonstrate that it is entitled to relief on these claims.

Defendant's arguments appear in two different documents: its argument with respect to Exhibit 225 appears in an amended motion for new trial on Betty Taylor's claims, and its arguments with respect to Exhibit 510M appears in a

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9. Defendant also raised some arguments based on evidentiary rulings. These arguments are rejected for the same reasons provided during the trial; further elaboration is not required.

separate motion requesting a new trial on Plaintiff Kline's claims. Between these two documents, Defendant has directed the court to only one case — *Mangan v. Broderick & Bascom Rope Co.*, 351 F.2d 24 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966) — and this case does not even involve a claim of unadmitted documents being sent to the jury room. Instead, this case discusses the specific situation when evidence of worker compensation benefits are discussed in the jury's presence during the trial on a suit for personal injury. In *Mangan*, the improper information was presented to the jury in open court; citing *Mangan* provides no guidance when, as here, a party claims improper material was made available to the jury while it deliberated.

Clearly, Defendant's argument can succeed only if evidence that was not admitted during the trial went to the jury room. The only way to prove this happened is to ask the jurors themselves. Although generally jurors "may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith," Fed. R. Evid. 606(b), jurors can be asked to testify about extrinsic or extraneous influences, including matters considered by the jury but not admitted into evidence. *E.g.*, *United States v. Rodriguez*, 116 F.3d 1225, 1227 (8th Cir. 1997). This does not mean, however, that Defendant's bare assertion that improper evidence was considered justifies recalling the jurors so that they can testify at a hearing to determine what information was considered by them. "[P]ost-verdict inquiries may lead to evil consequences: subjecting juries to

harassment, inhibiting juryroom [sic] deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989); *see also United States v. Estrada*, 45 F.3d 1215, 1228 (8th Cir.), *vacated on other grounds* 116 S. Ct. 664 (1995) ("Courts should not subject jurors to undue impositions.").

There are no cases in this circuit that discuss when a district court must hold a hearing to consider a party's claim that the jury considered extraneous evidence. The issue has been discussed in other circuits, however, and those circuits have reached similar conclusions as to the appropriate standard for determining when a hearing must be held. "To justify a post-trial hearing involving the trial's jurors, the defendant must do more than speculate; he must show clear, strong, substantial and incontrovertible evidence that a specific, nonspeculative impropriety has occurred." *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990) (quotation omitted); *see also Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989); *Ianniello*, 866 F.2d at 543. Recently, the Eighth Circuit issued an opinion that seems to endorse these views. *See United States v. Cunningham*, No. 97-1720, slip op. at 9 (8th Cir. Jan. 13, 1998).[10]

Defendant has failed to justify requiring the jurors to come to court to testify about what material was set to them

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10. Although most of these cases are criminal cases, the Court's independent research has failed to uncover any indication that the law is different in the civil context. Obviously, Rule 606(b) applies equally to civil and criminal cases.

during the deliberation process. With respect to Exhibit 225, Defendant contends that an incompletely redacted version of this exhibit was sent to the jury. Defendant arrives at this conclusion because when Plaintiffs' counsel was asked after the trial to provide a copy of this exhibit, the copy received failed to redact two of the paragraphs that the Court ordered to be redacted. From this fact, the Court is asked to speculate that the improperly redacted exhibit was sent to the jury room. The Court is not inclined to engage in this leap of logic, particularly when Defendant has failed to substantiate its claim (as is usually done when a claim of this sort it is raised) by obtaining an affidavit or other sworn statement from one of the jurors attesting to the fact that they saw the improper exhibit.[11] An affidavit of this sort not only could be considered, *e.g.*, *United States v. Hall*, 85 F.3d 367, 370 (8th Cir. 1996), but it is the best (if not the only) way for a party to justify a hearing on the matter. Defendant's mere speculation that an unredacted exhibit went to the jury is insufficient to justify a hearing.[12]

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11. Plaintiffs deny that the incompletely redacted version of Exhibit 225 went to the jury and contend that the wrong copy was mistakenly supplied to the Defendant.

12. Defendant also asserts (in a footnote) that "Exhibits 313P and 313Q were also apparently sent to the jury by the Plaintiffs although Defendant has no record that these Exhibits were properly introduced at trial." The record demonstrates that both of these exhibits were admitted into evidence over Defendant's objection. Even if this were not the case, the Defendant's bare claim that these items "apparently" went to the jury room is insufficient to justify a hearing to find out if this actually happened.

Appendix D

Exhibit 510M was an exhibit related to Kline's damages. Defendant contends that a version of Exhibit 510M with a damage figure of $23,567.00 improperly went to the jury room. Defendant reaches this conclusion in two ways: first, it argues that "apparently" it went to the jury room "because the verdict amount is the same figure shown on the re-calculated Exhibit 510M." This speculative reasoning is no better than the similar reasoning offered with respect to Exhibit 225, and does not justify conducting an inquiry of the jurors to find out if this exhibit was available to them.[13]

Defendant also contends that two jurors "were contacted and they indicated that they had a document showing $23,567.00 in damages for Kline and this document was used during deliberations." First of all, this declaration constitutes unsworn hearsay; it is a far cry from the sort of affidavit required to justify recalling the jurors to elicit their testimony. Moreover, taken on its face, the statement does not demonstrate that an improper document was sent to the jury room. Just because two jurors recall seeing a document with this figure does not mean that they saw *this* particular document. In short, Defendant has failed to make a clear, strong, nonspeculative and substantial showing that extraneous matters were presented to the jury during its deliberative process, so further inquiry into this matter is not warranted.

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13. It must be remembered that, although a juror could conceivably be asked whether improper information was in the jury room and whether it was discussed, a juror could not be asked what role it played in the jury's deliberation. *Hall*, 85 F.3d at 370-71.

Finally, with respect to both Exhibit 225 and 510M, the Court points out that it instructed the parties to review all of the exhibits to make sure that only admitted documents were sent to the jury room. The Court's intent was obvious: it wanted the parties, those with the greatest interest and the greatest familiarity with the evidence, to insure that nothing went to the jury room that was not supposed to be sent there. The Court can only assume that Defendant either knew of these problems at a time when they could be prevented — in which case its complaint is untimely — or that Defendant failed to properly police the process and protect its interests — in which case Defendant shares the blame for this mishap (if, in fact, a mishap occurred). Either way, this adds an additional, independent reason to deny Defendant the relief it seeks.

In conclusion, the award of punitive damages will be vacated and the judgment will be amended to reflect that Kathleen Kline prevailed on her claim of sexual harassment under the MHRA. In all other respects, the parties' post-trial motions (excepting the Motion for Equitable Relief) are denied.

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 2/17/98

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION IN LIMINE DATED AND FILED OCTOBER 17, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 94-0723-CV-W-3

KATHLEEN KLINE, et al.,

Plaintiffs,

v.

CITY OF KANSAS CITY, MISSOURI,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION IN LIMINE

Following a pretrial conference held on October 14, 1997, and after considering the materials filed by the parties, the following rulings are made with respect to the issues raised in Defendant's Motion in Limine (Doc. # 259):

1. Defendant seeks to bar evidence that was not "disclosed" prior to the discovery cutoff date of June 1, 1997. Keeping in mind that evidence can be "disclosed" in a variety of ways (including deposition answers, interrogatory answers,

Plaintiffs' Amended Complaint and documents provided by Plaintiffs), this request is granted.

The Court understands that this will bar evidence of discriminatory events that took place after the discovery cutoff date. However, as there has been no formal discovery with respect to these events, the Court is reluctant to include them in these proceedings. The Court also notes that the time has not expired for Plaintiffs to file an EEOC Complaint with respect to these events, meaning that this decision will not bar Plaintiffs from seeking redress.

2. Defendant's motion to exclude evidence of harassment not experienced by Plaintiffs[1] raises two distinct issues. First, it raises the issue of Plaintiffs' ability to testify as to matters they did not witness. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Plaintiffs may not testify about incidents that they did not personally observe.

Whether these incidents are admissible at all is a different matter. The Court concludes that evidence of "events of harassment" not personally witnessed or experienced by Plaintiffs is not relevant to any issue in the case. Evidence that other employees were harassed cannot be used to prove that Plaintiffs were harassed. Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

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1. In this context, the Plaintiffs in question are Kline and Taylor as they are the only plaintiffs with hostile environment/sexual harassment claims.

therewith."). In *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir. 1997), the Eighth Circuit acknowledged that "[i]n a hostile work environment claim, evidence concerning all circumstances of *the complainant's* employment must be considered . . ." (emphasis supplied)). However, evidence of "harassing acts" that occurred in other parts of the Fire Department (or otherwise outside of their presence) did not affect *their* work environment. This evidence has little probative value, and any value it has is "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Fed. R. Evid. 403.

Plaintiffs also emphasize that they have been affected by hearing about these incidents, both at work and during other female employees' depositions. The Court does not believe that Title VII permits redress in this situation. These co-workers may have a cause of action under Title VII, but the fact that Plaintiffs learned of the events giving rise to someone else's victimization does not give the Plaintiffs standing to complain about sexual harassment, nor does it tend prove that they were victims. There is also a strong risk that the jury may become confused by this evidence and render judgment in favor of Plaintiffs not because they were sexually harassed but rather because Plaintiffs' co-workers were sexually harassed. Similarly, events that occurred before or after Plaintiffs were assigned to a particular fire station do not demonstrate that Plaintiffs were subjected to sexual harassment.

For these reasons, evidence of sexual harassment experienced by other female firefighters may not be admitted unless it occurred in Plaintiffs' work environment. Absent

unusual circumstances surrounding a particular event, this prohibition limits such evidence to events that were actually witnessed or experienced by the Plaintiffs.

The Court will permit one exception to this ruling: evidence that individuals who allegedly harassed Plaintiffs also harassed other female employees may be presented at trial. If, for instance, there is evidence that a particular person harassed Kline and there is evidence that the same person harassed other female employees, this may demonstrate that Defendant knew or had reason to know that the person was engaging in conduct prohibited by Title VII and failed to take steps to prevent his conduct. Evidence of this sort has the necessary connection to Plaintiffs' claims to permit its consideration by the jury.

3. Defendant's request to bar evidence of harassing incidents that were not reported to management is denied.

4. Defendant's request to prohibit the use of phrases such as "boys club" and "good ol' boy system" is denied.

5. Defendant's request to bar evidence of recruitment, testing or hiring practices with respect to women and minorities is granted except insofar as Plaintiffs (particularly Kline and Wedow) are asserting claims regarding testing and promotion practices. Plaintiffs assert that the evidence demonstrates the lack of female employees in the Fire Department, but none of the Plaintiffs are asserting that they were discriminatorily denied employment with the Fire Department. Consequently, the evidence has very little (if any) evidentiary value. When that limited value is compared to the risk that the jury will

be diverted toward issues/claims that are not involved in this case, the Court concludes that the risk of unfair prejudice and jury confusion requires exclusion of this evidence.

6. Defendant requests a bar on the testimony from current or present member of the Kansas City (Missouri) City Council. This issue is intertwined with that raised in Point Seven of Defendant's Motion in Limine, which requests a similar ruling with respect to the former City Manager. This issue is also intertwined with Point Fifteen, which relates to the admissibility of employee surveys and reports based on those surveys. For ease of discussion, all three matters will be discussed together, starting first with the surveys and reports.

The surveys are, for the most part, simply described by the parties. A copy of two of them are attached to Plaintiffs' Response to Defendant's Motion In Limine. The survey dated September 1992 mentions that the Fire Department's employees were surveyed separately from other City employees, but the results are not reported separately. In addition, many of the survey's comments group matters raised in this lawsuit with matters that are not; for instance, the survey discusses findings with respect to "sexual and racial harassment": the former is an issue in this case but the latter is not. The survey dated April 1994 suffers from the same shortcomings.

Plaintiffs contend the surveys are relevant to show that City employees — both within and without the Fire Department — perceived that they were subjected to harassment and disparate treatment. However, the surveys

do not purport to establish whether harassment and disparate treatment actually existed, and Plaintiffs do not explain the relevance of anonymous City employees' beliefs that Title VII violations existed.

At most, the survey can serve as notice to Defendant that problems existed. With respect to this limited issue, additional problems are present. Although the Fire Department's employees were questioned separately, the survey does not report the results from those employees separately. Beliefs held by Defendant's employees generally are of limited evidentiary value. Moreover, some of the conclusions relate to issues that are not present in this case. Even if Fire Department employees reported a strong belief that racial discrimination is rampant, thereby putting Defendant on notice of this particular problem, it does nothing to advance any of Plaintiffs' claims.

Rather than prohibiting evidence on these issues at this time, the Court will permit Plaintiffs to present conclusions from the surveys (and not individual survey responses) that are limited in scope to both Fire Department employees and claims raised by Plaintiffs in this case. Before offering or referring to any such evidence, Plaintiffs shall advise the Court out of the jury's hearing so that the matter may be discussed further.

Assuming that Plaintiffs obtain a favorable ruling with respect to the admissibility of some portion(s) of the surveys, Plaintiffs will be permitted to call present and former members of the City Council and the former City Manager to ask whether they reviewed those portions of the surveys

and what action, if any, was taken in response to the information contained therein. Mindful of the legislative privilege enjoyed by these witnesses, Plaintiffs may not ask why certain actions were or were not taken. However, these witnesses can be asked whether the surveys were discussed and to identify what action, if any, was taken in response.

In addition, if any survey evidence is permitted at trial, it will be utilized only to demonstrate notice to Defendant. Accordingly, Plaintiff should prepare a limiting jury instruction for the Court's use.

7. This point raises the issue of Plaintiffs' ability to call the former City Manager to testify at trial, and is discussed in paragraph 6, above.

8. Defendant requests, and Plaintiffs agree, that evidence of the circumstances of the former City Manager's resignation should not be presented at trial.

9. Defendant seeks to bar evidence of Mike Fisher's federal criminal trial. Plaintiffs (and the Court) agree that evidence of Fisher's conviction is relevant only to impeach him in the event he is called as a witness. *See* Federal Rule of Evidence 609. In addition, it is the Court's understanding that federal law describes a conviction as both a finding of guilt and a sentence; unless Fisher is sentenced, evidence of his criminal proceedings are not admissible. Plaintiffs should provide contrary authority to the Court before they attempt any use of the outcome of Fisher's criminal trial.

10. Defendant raises a similar argument with respect to Kathryn Simmons, and the Court's ruling is the same. In

addition, the Court holds that evidence of the Defendant's contract with Simmons is not admissible if its sole purpose is to demonstrate that the Defendant "wasted money." This does not necessarily preclude Plaintiffs from advancing some other explanation for this evidence's admissibility, but the Court must be advised in advance before any evidence on this issue is elicited or offered.

11. Defendant also seeks a ban on any mention of prosecution of former City officials. The Court's ruling in Paragraph 9, above, covers this issue.

12. Evidence that prostitutes were brought to fire stations will be permitted to the extent that the incidents in question were observed by Plaintiffs or occurred in their work environment. Evidence of prostitutes visiting other fire stations (or fire stations where Plaintiffs used to work) will not be permitted. Evidence of drug use at fire stations will not be permitted except as discussed in the next paragraph.

13. Evidence that male firefighters violated Fire Department rules and regulations will be permitted at trial; the evidence is relevant to Plaintiffs' disparate treatment claims.

14. At this time, the Court lacks sufficient information to determine whether opinion testimony about the competence of Fire Department employees should be excluded at trial. Accordingly, Defendant's request to exclude such testimony will be denied without prejudice to Defendant's right to raise the issue at a later time.

15. The employee surveys were discussed in Paragraph 6, above.

16. Evidence from non-party female employees has been discussed in Paragraph 2, above. The Court does agree with Plaintiffs that evidence from non-parties may be relevant on the issue of equitable relief. Accordingly, depending on the nature of the jury's verdict, the Court may permit this testimony to be presented in a subsequent hearing to permit the Court to fashion appropriate equitable relief.

17. Defendant's request to bar evidence of events that occurred prior to 300 days before Plaintiffs filed their EEOC Complaints is denied for the reasons expressed in the Orders ruling on Defendant's Motions for Summary Judgment. The Court believes the violations alleged constitute continuing violations, and the evidence in question should be admitted.

This does not mean that the Plaintiffs may necessarily reach back forever to discuss transgressions from the past. Evidence beyond the 300 day time period must truly constitute part of a continuing violation. For instance, in Kline's case incidents involving Logan Grote occurred as far back as 1989, but there appears nothing in the record from before that date. Accordingly, with respect to Kline evidence of events occurring from January 1, 1989 to June 1, 1997 is admissible. (This issue appears to be less of a problem with respect to the other Plaintiffs, so no ruling appears necessary at present).

18. Evidence of events that occurred after Plaintiffs filed their EEOC Complaints is admissible as it constitutes evidence of continuing violations, so long as the evidence was revealed prior to the close of discovery in accordance with Paragraph 1, above.

19. Defendant's request to bar testimony from any undisclosed witnesses is granted.

20. Evidence of transgressions and rule violations by male firefighters will not be prohibited on relevancy grounds. The evidence is relevant to Plaintiffs' claims of disparate treatment. Defendant's hearsay objection is not sufficiently explained to permit a ruling at this time.

21. Defendant's request to bar evidence regarding Plaintiffs' allegations of disparate equipment and facilities is granted; in light of the Court's Summary Judgment Orders, this is no longer an issue in this case.

22. Defendant seeks to prohibit evidence of events that occurred prior to the enactment of the Civil Rights Act of 1991 (November 21, 1991). Although Plaintiffs cannot recover damages for anything that happened before that date, *see Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1220 n.1 (8th Cir. 1997), — and the jury will be so advised — evidence from before that date is still relevant to the violations that continued beyond that date. Accordingly, this evidence will be permitted at trial.

23. Defendant seeks to exclude evidence of policy changes that were implemented after this lawsuit was filed. In light of the broad language in Federal Rule of Evidence 404 and its attendant policy purposes, the Court is inclined to exclude this evidence. However, the Court lacks sufficient information to reach a definitive conclusion, and would prefer to consider the evidence and its context at trial. Accordingly, Plaintiffs are instructed to advise the Court out

of the jury's hearing before any such evidence is proffered or mentioned.

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 10/17/97

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION GRANTING IN PART AND DENYING IN PART. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO ANNE WEDOW DATED AND FILED SEPTEMBER 29, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 94-0723-CV-W-3

KATHLEEN KLINE, et al.,

Plaintiffs,

v.

CITY OF KANSAS CITY, MISSOURI,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO ANNE WEDOW

Pending is Defendant's Motion for Summary Judgment with respect to Anne Wedow. For the following reasons, the Motion is granted in part and denied in part.

Appendix F

I. BACKGROUND

Wedow, a white female, has been employed in the Fire Department since January 1977, was promoted to Captain in July 1989 and currently holds the rank of Battalion Chief. She filed an EEOC Complaint on July 1, 1993, and in this case has asserted Federal and State claims for sexual harassment, disparate treatment based on gender and retaliation (for a total of six counts). Her sexual harassment claims are based on the following events:

1. Between 1982 and 1986, Ellis Williams grabbed her breasts. It is not clear how often this occurred. It is also not clear who Williams was; Defendant asserts that Williams was Wedow's driver, but the answer to a deposition question that would have established this fact has not been supplied. *See* Wedow Deposition at 168 (page 169 not supplied to Court).

2. On one occasion in 1989, a firefighter held a toy pistol to Wedow's head while she was sleeping and professed to be "crazy Raymond, the postman."

3. On one occasion in 1993, Wedow found a condom-covered banana on the seat of her car.

The record also contains evidence supporting Wedow's claims of disparate treatment. In light of the Court's ruling on these Counts, there is no need to discuss these issues at length.

Appendix F

II. DISCUSSION

A. Standards

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See generally Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984), *cert. denied*, 470 U.S. 1057 (1985). However, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the . . . pleadings, but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The analysis for claims brought under Title VII is applicable to claims brought under the Missouri Human Rights Act ("MHRA"). *E.g.*, *Finley v. Empiregas*, 975 F.2d 467, 473 (8th Cir. 1992). The Court intends its discussion to apply equally to the claims brought under both statutory schemes.

Appendix F

B. Sexual Harassment

Defendant contends that the incidents relied upon by Wedow will not support a sexual harassment claim, and that many of the events fall beyond the 300-day time period for filing an EEOC Complaint. *See* 42 U.S.C. § 2000e-5(e)(1). The Defendant's contentions are correct.

In the case of continuing violations, the 300-day period commences upon the last occurrence of discrimination. *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996). "[E]vidence of a hostile environment falls under the 'continuing violation' exception to a statute of limitations bar and . . . the limitations period runs from the last occurrence of discrimination. *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996) (second quotation omitted); *see also Gipson*, 83 F.3d 225 at 229-30. However, the record does not reflect that Wedow experienced a continuous chain of events that constituted harassment. The incidents involving Williams stopped sometime in 1986: more than 300 days before Wedow filed her EEOC Complaint. The next event, which involved Spencer, occurred in 1989: more than 300 days before Wedow filed her EEOC Complaint. The final event occurred in 1993; although this is within the time limit required by section 2000e-5(e)(1), there is no relationship between the 1993 event and the events involving Williams and Spencer. Certainly, these three events individually could constitute continuing violations, but they are too distant in time and different factually to justify considering them collectively as a single continuing violation.

This leaves one incident that is not barred by section 2000e-5(e)(1): Wedow's discovery of a condom-covered banana on the seat of her car. This event does not constitute actionable sexual harassment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993). Conduct is sufficiently severe and pervasive if it alters the conditions of employment and creates an abusive working environment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *see also Callanan v. Runyon*, 75 F.3d 1293, 1296 (8th Cir. 1996). The act of leaving a condom-covered banana in another person's car is disgusting, crass, and (at best) juvenile. However, the single occurrence of this event is insufficiently pervasive to satisfy the objective standard established in *Harris* and *Meritor*.

Wedow cannot augment this incident by relying on incidents involving other people outside her presence. The fact that other female firefighters endured sexual harassment might properly be considered for other purposes, but it does not establish that, when viewed objectively, the terms, conditions or privileges of Wedow's employment were adversely affected. *See, e.g., Meritor*, 477 U.S. at 67; *Kimzey v. Wal-Mart Stores*, 107 F.3d 568, 573 (8th Cir. 1997) ("In a hostile work environment claim, evidence concerning all circumstances of *the complainant's* employment must be considered . . ." (emphasis supplied)). Wedow was neither a victim of nor a witness to these other incidents; she simply heard about them after they occurred, and there is nothing

about them that tends to demonstrate that they affected the terms and conditions of Wedow's employment.

Even if this single incident is a sufficient basis upon which to predicate a sexual harassment claim, Defendant is still entitled to judgment because Wedow admits that she never reported the incident. *See Callanan*, 75 F.3d at 1296 (quoting *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993)) (establishing the fifth element of a sexual harassment claim as whether the defendant "knew or should have known of the harassment and failed to take proper remedial action"). The requisite knowledge is not established simply by proving that the banana was placed by a co-worker, or even by a supervisor. *See Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997). There is no evidence permitting a jury to conclude that the event became "common knowledge" or was otherwise known to Wedow's superiors. Consequently, even if this incident was sufficiently severe and pervasive to constitute sexual harassment, Wedow cannot prevail because there is no evidence that her employer knew or should have known about it.

C. Content of EEOC Complaint

Defendant argues that Wedow did not assert her claim that Defendant failed to provide proper and/or separate equipment, lockers and sleeping quarters for female firefighters in her EEOC Complaint. Defendant is correct; Wedow has not alleged any facts that put either the EEOC or Defendant on notice that she was complaining about these issues, nor does her suggested relief address this concern. Wedow cannot rely upon her representation that the facts

she did allege were merely examples of discriminatory conduct because this would destroy the rule requiring claims to be asserted in the EEOC Complaint. *See Edwards v. Department of the Army*, 708 F.2d 1344, 1347 (8th Cir. 1983) (per curiam) (explaining purpose for raising grounds for complaint before the EEOC). Moreover, these allegations are distinct from those that actually appeared in her EEOC Complaint. *Roxas v. Presentation College*, 90 F.3d 310, 318 n.5 (8th Cir. 1996) (citing *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222-23 (5th Cir. 1994)). Finally, Wedow is not helped by the fact that the violation is continuing (assuming that this is a correct legal conclusion); even a continuing violation must be raised in an EEOC Complaint. There is nothing in Wedow's EEOC Complaint that is related to her equal equipment and facilities claim, so she cannot rely on these facts to support her claim of disparate treatment.

D. Remaining Arguments

After reviewing the remaining arguments, the Court concludes that there are disputed issues of material fact precluding entry of summary judgment in Defendant's favor. With respect to Defendant's arguments on Wedow's retaliation claim, the Court also notes that Defendant has failed in its initial burden to demonstrate the absence of a disputed material fact. Essentially, Defendant's argument is that Wedow "cannot prove" retaliation, or that "there is no proof" of retaliation; Defendant also contends that Deputy Chief Weixeldorfer assessed all Battalion Chief exams. Defendant has not identified the portions of the record that support any of these contentions. This is Defendant's motion, and Defendant cannot baldly assert that Wedow is unable to

prove her claims and thereby shift the burden to Wedow to demonstrate the existence of a factual dispute. Defendant must first point to those portions of the record establishing the *absence* of a factual dispute; Defendant has not carried this initial burden with respect to Wedow's retaliation claims.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment with Respect to Anne Wedow is granted in part and denied in part. Judgment shall be entered in Defendant's favor on Counts VIII and XI; the Motion for Summary Judgment is denied in all other respects.

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 9/29/97

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO ERMA MORGAN DATED AND FILED SEPTEMBER 29, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 94-0723-CV-W-3

KATHLEEN KLINE, et al.,

Plaintiffs,

v.

CITY OF KANSAS CITY, MISSOURI,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO ERMA MORGAN

Pending is Defendant's Motion for Summary Judgment with respect to Erma Morgan. For the following reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

Morgan, a black female, has been employed in the Fire Department since April 1979. She began her employment as

a Fire Dispatcher I. In 1987 she accepted a voluntary demotion; the parties do not agree as to her current position, but the dispute is not relevant for purposes of Defendant's Motion.

Morgan filed an EEOC Complaint on April 16, 1994, and in this case has asserted Federal and State claims for racial harassment, disparate treatment based on gender and retaliation (for a total of six counts). For clarity's sake, the facts underlying each of these claims[1] is outlined separately.

A. Racial Harassment

Morgan's racial harassment claim is premised on the following events:

1. When black people came to the Fire Dispatcher area in 1980 and 1981, Ernie Vautard (an otherwise unidentified individual) would tell Morgan that they were there to see her. Morgan did not know these people, forcing her to conclude that Vautard made these statements simply because she, like the visitors, was black. The parties have not indicated how often this sequence of events occurred during the specified time frame.

2. In January 1994, "the buzzer rang" and Jerry Harrington (an otherwise unidentified individual) said in Morgan's

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1. The analysis for claims brought under Title VII is applicable to claims brought under the Missouri Human Rights Act ("MHRA"). *E.g.*, *Finley v. Empiregas*, 975 F.2d 467, 473 (8th Cir. 1992). The Court intends its discussion to apply equally to the claims brought under both statutory schemes.

presence "I better go get it; it's a big black man." The parties have not indicated how often this sequence of events occurred during the specified time frame.

3. Connie Wilcox and Anita Kleiman, two of Morgan's friends, told Morgan that she was referred to by others as "the nigger" and the "black bitch." However, Morgan admits that she never heard anyone direct racial epithets to her personally.

4. At her deposition, Morgan acknowledged that she wrote a memo declaring that she was accepting a voluntary demotion so she could go back to school. Morgan Depo. at 35. She testified, however, that this was a false reason; the real reason she accepted the demotion was because, as she put it, "it was very stressful for me to work with people that I felt treated me racist and people that harassed me, and it was my way of changing jobs and not having to sit side by side with a lot of people who told racial jokes, made racial slurs, racial comments, sexist jokes, ..." Morgan Depo. at 36. Morgan also conceded that she never told any of her supervisors of her true motivations. *Id.*

B. Disparate Treatment Based on Gender

Morgan's disparate treatment claim stems from an incident that occurred in early October 1993. Larry Gonnello looked at Morgan's e-mail[2] and forwarded letters she

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2. It is not clear whether Gonnello used Morgan's password or Morgan simply failed to log off the computer. The true answer to this conflict is irrelevant for purposes of this Motion.

received and wrote to his own computer. Defendant conducted legal inquiries to determine the propriety of searching Gonnello's office, desk and computer to obtain evidence of his actions. Ultimately, a disciplinary hearing was held on November 10, 1993. Gonnello was suspended for twenty-four hours and placed on probation for approximately four and a half months, with the suspension delayed pending his good conduct during the probation. Additionally, Gonnello's merit increase, which would have been due on January 25, 1994, was delayed ninety days. Gonnello's "past exceptional service" was specifically cited as the reason a more severe punishment was not imposed.

In response, Morgan has identified portions of Gonnello's performance record that she believes belies the assertion that Gonnello's past service was exceptional, suggesting her belief that Gonnello's punishment was too lenient. She has also expressed her unilateral belief that female employees are disciplined more harshly than male employees. However, Morgan also testified that she has never been disciplined. As it turns out, Morgan apparently forgot about an incident in 1982 in which she was disciplined for failing to report in sick within the required time limit. However, there is no cite to the record discussing this disciplinary event, and Morgan has not alleged that whatever discipline she received was harsher than received by similarly situated male employees.[3]

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3. Morgan has also directed the Court's attention to exhibits relating to Morgan's pay. Morgan has not explained any arguments she has relating to pay, and she has not asserted a claim related to pay in either her EEOC Complaint, Ex. 117, or in the Second

(Cont'd)

Appendix G

C. Retaliation

On November 8, 1993, Morgan (and others) signed a letter of support for Kathleen Kline and Anne Wedow. Kline and Wedow were asserting claims of discrimination, and are Morgan's co-plaintiffs in this case. Morgan has asserted that she required counseling and that Defendant waited eight weeks before approving the counseling. She alleges that this delay was retaliation for her support of Kline and Wedow. Defendant contends that this delay does not constitute adverse employment action, that "Morgan has no proof that 'several weeks' as she testified in her deposition, is an unreasonable period of time to wait for payment of counseling under the circumstance alleged by Morgan," and that "Morgan has no proof that the person deciding the issue of payment for counseling in October 1993 was aware of either [Kline's and Wedow's charges] or the November 8, 1993 letter of support sent to the City's Law Department."

II. DISCUSSION

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See generally Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir.

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Amended Complaint. Therefore, the Court cannot consider these exhibits in assessing Morgan's disparate treatment claim. *See Roxas v. Presentation College*, 90 F.3d 310, 318 n.5 (8th Cir. 1996) (citing *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222-23 (8th Cir.1994)).

1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984), *cert. denied*, 470 U.S. 1057 (1985). However, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the . . . pleadings, but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

A. Racial Harassment

Initially, the Court must determine which events may properly constitute the basis for Morgan's racial harassment claim. Ordinarily, a plaintiff may recover only for discriminatory acts that have occurred within 300 days of the filing of an EEOC Complaint. In the case of continuing violations, the 300-day period commences upon the last occurrence of discrimination. *Gipson v. KAS Snacktime Co.*, 83 F.3d 226, 229 (8th Cir. 1996). "[E]vidence of a hostile environment falls under the 'continuing violation' exception to a statute of limitations bar and . . . the limitations period runs from the last occurrence of discrimination." *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1214 (8th Cir.

1996) (second quotation omitted); *see also Gipson*, 83 F.3d 225 at 229-30. However, the record does not reflect that Morgan experienced a continuous chain of events that constituted harassment. The incidents involving Vautard stopped sometime in 1981: more than 300 days before Morgan filed her EEOC Complaint. Similarly, the events that caused Morgan to accept a voluntary demotion in 1987 stopped after she accepted the demotion, but she did not file an EEOC Complaint within 300 days. The next events occurred many years later, so the Court cannot conclude that there has been a continuing violation stretching back to 1980-81.

Next, the elements of a racial harassment claim must be considered. Morgan must demonstrate that (1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) Defendant knew or should have known of the harassment and failed to take proper remedial action. *See Kopp v. Samaritan Health Sys. Inc.*, 13 F.3d 264, 289 (8th Cir. 1993). This case presents the intriguing question: what does it mean to be *subjected to harassment*? Morgan does not contend that her friends — Wilcox and Kleiman — subjected her to racially disparaging comments when they reported the conduct of other people.[4] Similarly, she does

4. In fact, it appears that evidence on this point will come from Wilcox and Kleiman. Plaintiff cannot testify as to what she was told because her testimony would be offered to prove the truth of Wilcox's and Kleiman's statements and would constitute hearsay. Wilcox and Kleiman could testify about what other people said because their testimony would not be offered to prove the truth of the out of court statements made by other coworkers.

not contend that she ever heard any such comments directed at her (or, for that matter, directed at other people); if this were the case, resolution of the matter in Morgan's favor would be obvious. Although Morgan is not terribly clear on this point, her racial harassment claim appears predicated upon her learning that other people used racially disparaging comments to refer to her behind her back and without her knowledge.

The Court has been unable to find any cases on point. Cases involving racial (and sexual) harassment have been marked by a common theme: improper conduct that has been witnessed or otherwise experienced directly by the victim. This component is lacking in the present case. Given that Morgan did not personally witness any of the remarks about her, it is difficult to see how a jury can conclude that Morgan was subjected to harassment. This conclusion is buttressed by the Supreme Court's discussion of the evil that is to be guarded against; namely, that an employee not be required to "run a gauntlet" of abuse or endure racial epithets. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quotation omitted) (comparison between sexual harassment and racial harassment). Morgan ran no such gauntlet, and was not required to endure epithets.

Additionally, because Morgan was not a witness to any epithets, the Court is not persuaded that the conduct is sufficiently severe and pervasive to constitute harassment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." *Harris v. Forklift*

Sys., Inc., 510 U.S. 17, 20 (1993). Conduct is sufficiently severe and pervasive if it alters the conditions of employment and creates an abusive working environment. *Meritor*, 477 U.S. at 67; *see also Callanan v. Runyon*, 75 F.3d 1293, 1296 (8th Cir. 1996).

On the other hand, "mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." *Harris*, 510 U.S. at 21. To have a submissible case, the plaintiff must allege conditions that, viewed both objectively and subjectively, affect the terms and conditions of employment. In this case, the alleged harassment consists of racial epithets made by unidentified individuals that were not even heard or substantiated by Plaintiff. The Court concludes that these facts do not satisfy the legal requirements for a racial harassment claim. The Court also concludes that the additional consideration of Harrington's statement does not provide a basis for Morgan's claim.

B. Disparate Treatment

Morgan's disparate treatment claim is rather unusual. She is not claiming that she was disciplined more harshly than similarly treated male employees; indeed, the gravamen of her claim does not involve any discipline she received. She also does not claim that similarly situated men whose e-mail was perused by co-workers, were given any greater consideration than she was accorded in this case. Instead, Morgan's claim seems to be either (1) that Gonnello's punishment was not severe enough to suit her, (2) that if Gonnello had been a woman (s)he would have been punished

more severely, and/or (3) as a general rule, women are subject to harsher discipline then men and Gonnello represents the latest example of this trend. Regardless of how Morgan's claim is described, her theory does not state a claim under Title VII. Female employees who have been disciplined by Defendant may be able to rely on the incident involving Gonnello to assert a claim that they have been disparately disciplined. *See Wilmington v. J.I. Case Co.*, 793 F.2d 909, 915 (8th Cir. 1986) (discussing elements of this claim). However, Morgan does not claim that *she* was disciplined more harshly because she is a woman, so she cannot assert this claim. Ultimately, Morgan has completely fail to allege any circumstance in which *she* was treated differently based on *her* gender, so she cannot prevail on a claim under Title VII.

C. Retaliation

As a legal issue, the Court concludes that a delay in approving benefits may constitute adverse employment action. With respect to the factual issues, Defendant has failed to demonstrate the absence of a genuine dispute of material fact. Therefore, the Motion must be denied with respect to Morgan's retaliation claim.

III. CONCLUSION

In accordance with the above, Defendant's Motion for Summary Judgment with Respect to Erma Morgan is granted in part and denied in part. Judgment is entered in favor of Defendant on Counts XIII, XIV, XVI and XVII, but is denied with respect to Counts XV and XVIII.

Appendix G

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT
COURT

DATE 9/29/97

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO KATHLEEN KLINE DATED AND FILED SEPTEMBER 29, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 94-0723-CV-W-3

KATHLEEN KLINE, et al.,

Plaintiffs,

v.

CITY OF KANSAS CITY, MISSOURI,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO KATHLEEN KLINE

Pending is Defendant's Motion for Summary Judgment with respect to Kathleen Kline. For the following reasons, the Motion is granted in part and denied in part.

Appendix H

I. BACKGROUND

Kline, a white female, has been employed by the Fire Department since March 1977; she attained the rank of Captain in January 1987 and continues to hold that rank at this time. She filed an EEOC Complaint on July 1, 1993, and in this case has asserted Federal and State claims for sexual harassment, disparate treatment based on gender and retaliation (for a total of six counts). In response to an interrogatory question posed by Defendant, she identified ninety-six separate examples of sexual harassment, discrimination and retaliation.[1]

With respect to evidence of sexual harassment, a brief summary of the events supported by the record (when viewed in the light most favorable to Kline, as is required when reviewing a summary judgment motion) is helpful and appears below:

1. In December 1989 Kline found "greasy dildos" hanging on her fire coat.

2. Battalion Chief Logan Grote (Kline's battalion chief from approximately 1988 or 1989 to 1993) "massaged his genitals" whenever he talked to her; no time frame is provided for these incidents, but the first incident recited in the record is May 12, 1986, and the last incident recited in the record is December 1, 1992.

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1. The Court mentions Kline's interrogatory answers only because they appear to have provided the organizational framework for Defendant's Motion. The Court has not limited its review of the record to these answers, but has examined the depositions, exhibits and other materials referenced by the parties.

3. In October 1990, a mock "recruitment poster" was circulated, depicting a picture of a bodybuilder with Kline's head superimposed over the bodybuilder's face, and another female firefighter's face superimposed over a picture of a nude female model. That same month, Kline received anonymous envelopes through Interdepartment Mail containing pictures and covers from Penthouse Magazine.

4. "Captain Tutt" pinched Kline's left nipple in November 1991.

5. In November 1991, Grote addressed Kline as a "cunt" and left messages on her answering machine; the content of these messages are not clear, but the record suggests that they indicated Grote's desire to have sex with Kline. Grote also left a message on an answering machine belonging to James Masters (apparently, another fireman), instructing him "when you get done with Kline send her over to me." These calls were made from the fire station. The following day, Captain Tutt asked Kline how long she had been having sex with Grote. On other occasions, Tutt told Kline that Grote wanted to have sex with her.

6. Also in November 1991, Kline "saw a piece of white paper which seemed to be a facsimile of a kotex. This white paper had been painted red. A brown paper towel was attached with a note on it which read "B SHIFT'S RAG . . PUT IT IN YOUR MOUTH." Exhibit 25 to Plaintiff's Suggestions in Opposition. Kline worked on the B shift.

7. The Fire Department promulgated a sexual harassment policy (the "Policy") on November 25, 1991; on January 3, 1992, Chiefs Dill, Booth and Grote came to the station with a copy of the Policy to discuss problems another female firefighter was having.[2] Chief Dill observed Kline's bed and asked "What's going on here, there are two pillows in this bed," which Kline (and, as may be inferred from the ensuing laughter, the men gathered nearby) interpreted to suggest that Kline had been sleeping with someone in her bed.

8. On January 6, 1992, an anonymous note was left on Kline's locker that stated "Kline the dick sucker, this is Kline's box."

9. On January 12, 1992, Grote called Kline and asked whether she sleeps in the nude.

10. In September 1992, Grote told Kline that it was within his power to determine whether she would be the first female battalion chief.

11. On October 5, 1992, Grote told Kline that he had "slaughters disease" and could no longer "fuck on his knees." That same month he appeared at her house drunk, told her that she looked good while sleeping and that he liked to watch her when she slept.[3] Grote also called

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2. Elsewhere, the record suggests this is the first time Kline learned of the Policy's existence and terms.

3. It is not entirely clear, but this statement about Grote watching Kline sleep appears to refer to instances when Kline (as is

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Kline at home in December 1992; it is not clear what he said.

12. In the Spring of 1993, following an incident at the drill school in which two female firefighters were called "cunts," the ladies in question (and certain men who supported them) were told, essentially, that life at work would be difficult if they continued making waves about the incident. These individuals were also given the "silent" treatment. Kline attended a union meeting on May 5, 1993 and heard at least one male firefighter complain "about people calling around and saying to harass these men."

13. In August 1993, someone placed a cartoon on the bulletin board. The cartoon depicted the Fire Chief plugging a dike with his fingers. One of the blocks on the dike was labeled "EEOC". A second cartoon hanging in the Battalion Chief's office contained a mock "sexual harassment consent form" with blanks to be filled out for, among other things, "sex preferred" and "position preferred."

The Policy requires an employee who believes they are the victim of sexual harassment to tell the harasser to stop and to report the behavior to (1) the immediate supervisor or the next level supervisor who is not involved in the harassment, (2) the Human Relations Department, or (3) the

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required by her job) sleeps at the fire station. For instance, on October 29, 1992 and November 1, 1992, Kline caught Grote coming into her office while she was trying to go to sleep.

Personnel Department. Obviously, Kline could not "comply" with the Policy prior to her knowledge of its existence. Nonetheless, despite Kline's utilization of grievance procedures even prior to the Policy's existence, the only events she complained about (either formally or informally) were the note on her locker and the "kotex fax."[4] With respect to the former, Kline wrote Grote a letter describing the incident and attaching the notes; the record is not clear whether anything further was done. With respect to the latter, Kline sent a memo to Chief William Lane, who forwarded the complaint to Deputy Chief Irvin Ross. Nothing happened immediately; however, in February 1992 Kline sent a memo discussing racial harassment to Grote, and in August 1992 Deputy Chief James Gibson came to Kline's station. There is no doubt that he discussed the racially-oriented incidents, but there is a conflict in the record as to whether he discussed any gender-related incidents.

The record also contains evidence supporting Kline's claims of disparate treatment and retaliation. In light of the Court's ruling on these Counts, there is no need to discuss these issues at length.

II. DISCUSSION

A. Standards

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine

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4. The record also reflects that Kline punched Captain Tutt after the "pinching incident." Kline's Depo. at 244. However, the record does not reflect that Kline took any further action with respect to this incident.

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See generally Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984), *cert. denied*, 470 U.S. 1057 (1985). However, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the . . . pleadings, but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

B. Timeliness of Administrative Complaints

1. Title VII

Defendant contends that Plaintiff's claims are barred for failure to file an EEOC Complaint within 300 days of the events in question as required by 42 U.S.C. § 2000e-5(e)(1). In the case of continuing violations, however, the 300-day period commences upon the last occurrence of discrimination. *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996). "[E]vidence of a hostile environment falls under the 'continuing violation' exception to a statute

of limitations bar and . . . the limitations period runs from the last occurrence of discrimination." *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996) (second quotation omitted); *see also Gipson*, 83 F.3d 225 at 229-30. Similarly, complaints about inequities in pay and promotion are continuing violations because each check delivered constitutes a separate actionable wrong. *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc).

Kline's complaint regarding pay inequities constitutes a continuing violation. Additionally, her claim that she was denied opportunities to work out of class and thereby had diminished opportunities for extra pay and advancement constitutes a continuing violation. Finally, the record demonstrates that some of the conduct supporting her sexual harassment claim (most notably involving Logan Grote) occurred within the 300-day period preceding the filing of her EEOC Complaint. The record also contains evidence to permit a jury to conclude that the incidents are not individual, discrete events (as contended by Defendant), but rather demonstrate the pervasive nature of gender-based harassment as it existed at the Fire Department. The Court therefore concludes that the conduct complained of constitutes a continuing violation, and Kline's EEOC Complaint was not untimely.

2. MHRA

Kline's state law claims are based on the Missouri Human Rights Act ("MHRA"), which is similar to Title VII in that it requires the filing of an administrative complaint

before a lawsuit may be brought. However, unlike an EEOC Complaint, an MHRA Complaint must be filed within 180 days of the last discriminatory act. Mo. Rev. Stat. § 213.075(1). The Court concludes that some of the events giving rise to Kline's disparate treatment claim occurred within the 180 days preceding the filing of her MHRA Complaint; namely, the receipt of paychecks reflecting a lower salary. However, there are no events giving rise to Kline's sexual harassment claims within the 180-day period. The closest event the Court can identify involved the two female firefighters at the drill school. Although this is evidence that those women were subjected to harassment, it is not evidence that Kline was subjected to harassment. *See Kimzey v. Wal-Mart Stores*, 107 F.3d 568, 573 (8th Cir. 1997) ("In a hostile work environment claim, evidence concerning all circumstances of *the complainant's* employment must be considered . . ." (emphasis supplied)). Similarly, evidence of "harassing acts" that occurred when Kline was not present did not affect *her* work environment. Consequently, Kline cannot assert a claim for sexual harassment under the MHRA.

C. Failure to Complain About Harassment

Defendant's second principal argument is that Kline's failure to complain about harassment means that she cannot carry her burden to prove that it knew or should have known about the harassment. *See Callanan v. Runyun*, 75 F.3d 1293, 1296 (8th Cir. 1996) (quoting *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir.1993)) (establishing the fifth element of a sexual harassment claim as whether it "knew or should have known of the harassment and failed to take proper remedial action"). Even though some of the

harassment was inflicted by Kline's supervisor(s), knowledge is not automatically imputed to the Defendant. *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997). Nonetheless, when the record is viewed in the light most favorable to Kline, there is sufficient evidence to permit a jury to conclude that knowledge of the events spread quickly, or was otherwise known, throughout the Fire Department. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 (11th Cir. 1997) ("A plaintiff also can prove an employer's knowledge by showing that the harassment was pervasive enough to charge the employer with constructive knowledge."). This conclusion is buttressed by the manner in which Defendant has presented its argument; instead of presenting affidavits or deposition testimony demonstrating that high-ranking officials were unaware of the situation, Defendant has relied solely on Kline's failure to avail herself of various grievance procedures. Certainly, her failure to file a complaint or report the incidents is relevant evidence, but it is not a requirement for her cause of action and it does not, alone, dispositively prove that the Defendant did not know or should not have known about the conduct at issue. *Cf. Varner*, 94 F.3d 1209 at 1213.

At trial, the burden to prove that Defendant knew or had reason to know about the harassment will fall on Kline. Presently, the burden falls on Defendant because it is the moving party, and as the movant Defendant has the initial burden of coming forth and demonstrating the absence of any material factual disputes. Fed. R. Civ. P. 56(e) (describing the non-moving party's obligations "[w]hen a motion for summary judgment is made and supported as provided in this rule . . . ."). It is only after this has been

done that Kline is obligated to respond by demonstrating the existence of a factual dispute. Defendant has failed in its initial burden by not providing cites to the record demonstrating its lack of knowledge. Consequently, Kline has no obligation to shoulder.[5]

D. Content of EEOC Complaint

Defendant's third primary argument relates specifically to Kline's complaint about Defendant's failure to provide proper and/or separate equipment, lockers and sleeping quarters for female firefighters. Kline failed to include this claim in her EEOC Complaint, and these allegations are distinct from those that actually appeared in her EEOC Complaint. *Roxas v. Presentation College*, 90 F.3d 310, 318 n.5 (8th Cir. 1996) (citing *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222-23 (8th Cir. 1994)). Kline has not alleged any facts that put either the EEOC or Defendant on notice that she was complaining about these issues, nor does her suggested relief address this concern. Kline cannot rely upon her representation that the facts she did allege were merely examples of discriminatory conduct because this would destroy the rule requiring claims to be asserted in the EEOC Complaint. *See Edwards v. Department of the Army*, 708 F.2d 1344, 1347 (8th Cir. 1983) (per curiam) (explaining purpose for raising grounds for complaint before the EEOC). Kline is not helped by the fact that the violation is continuing (assuming that this is a correct legal conclusion); even a continuing violation must be raised in an EEOC Complaint.

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5. This sentiment was expressed earlier, virtually verbatim, when Plaintiffs' Motion for Partial Summary Judgment was denied. *See* January 24, 1997 Order at 4.

There is nothing in Kline's EEOC Complaint that is related to her equal equipment and facilities claim, so she cannot rely on these facts to support her claim of disparate treatment.

E. Remaining Arguments

The remainder of Defendant's arguments need not be discussed in great detail. It is sufficient to say that the Court has examined the parties' arguments and the materials they have provided in support and, after examining these items, the Court concludes there are disputed issues of material fact that preclude the entry of summary judgment. However, Kline has admitted that on August 30, 1993, she advised Defendant that she no longer wanted opportunities to work out of class. Kline has explained that she made this decision because "Fire Suppression personnel refused to take orders from her," but she has not presented any evidence demonstrating that this was because she was a woman. This evidence is crucial to any disparate treatment claim, *e.g.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 n.4, 519 (1993); *Ryther v. KARE 11*, 108 F.3d 832, 837-38 (8th Cir. 1997) (en banc); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996), and in its absence the Court rules that Kline cannot assert any claim relating to her opportunities to work out of class after August 30, 1993.

III. CONCLUSION

For the foregoing reasons, summary judgment is entered in favor of Defendant with respect to Count V of Plaintiffs' Second Amended Complaint, which contains Kline's claims for sexual harassment under the MHRA. In addition, Kline

will not be permitted to predicate any of her claims on allegations of unequal facilities and equipment, nor will she be permitted to assert a claim arising from opportunities to work out of class after August 30, 1993. In all other respects, Defendant's Motion for Summary Judgment with Respect to Kathleen Kline is denied.

IT IS SO ORDERED.

s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 9/29/97

APPENDIX I — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 30, 1999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1593/1846WMKC

Kathleen Kline, et al.,

Appellants,

vs.

City of Kansas City, Missouri,

Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

June 30, 1999

Order Entered at the Direction of the Court:

s/ [illegible]
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX J — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2

42 U.S.C. Sec. 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, . . . , sex, . . . ; or

* * *

42 U.S.C. § 2000e-3

42 U.S.C. Sec. 2000e-3 Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

* * *

42 U.S.C. § 2000e-5

42 U.S.C. Sec. 2000e-5 Enforcement provisions.

(e) Time for filing charges; . . .

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, . . .

* * *

Mo. Rev. Stat. § 213.010

213.010 V.A.M.S. Definitions

As used in this chapter, the following terms shall mean:

* * *

(6) "Employer" includes the state, or any political or civil subdivision thereof, or any person employing six or more persons within the state,

and any person directly acting in the interest of an employer, but does not include corporations and associations owned and operated by religious or sectarian groups; . . .

* * *

(17) "Respondent", a person who is alleged to have engaged in a prohibited discriminatory practice in a complaint filed with the commission;

* * *

Mo. Rev. Stat. § 213.055

213.055 V.A.M.S. Unlawful employment practices

1. It shall be an unlawful employment practice:

(1) For an employer, because of the . . . sex, . . . of any individual:

(a) To . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ;

* * *

Appendix J

Mo. Rev. Stat. § 213.010

213.070. Additional unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

* * *

(2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;

* * *

(4) To discriminate in any manner against any other person because of such person's association with any person protected by this chapter.

* * *

Mo. Rev. Stat. § 213.111

213.111. Right to civil action, when — relief available — costs and attorneys' fees, awarded when

1. If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice, the commission has not

completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his right to bring a civil action within ninety days of such notice against the respondent named in the complaint. . . .

2. The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, **and may award to the plaintiff actual and punitive damages,** . . . (emphasis added)

* * * *